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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL. ROSE HALVEY, PETITIONER,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED AUGUST 10, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notice of Appeal to Appellate Division	3	2
Order appealed from	4	3
Petition for writ of habeas corpus	8	5
Writ of habeas corpus	14	8
Return to writ of habeas corpus	15	9
Statement of evidence	17	11
Appearances	17	11
Motion to dismiss	17	11
Testimony of Rose Halvey	19	12
John F. Halvey	51	39
Relator's exhibit 1—Final decree of divorce granted by the Circuit Court of Dade County, Florida	69	53
Respondent's exhibit "A"—Note from "Rose" to "John"	74	55
Opinion, Benvenga, J.	75	56
Stipulation settling case	79	59
Order settling case	79	59
Stipulation waiving certification	80	60

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—5917

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Order filing record in Appellate Division	80	60
Supplemental statement under Rule 234	81	60
Notice of appeal to Court of Appeals	82	61
Order of affirmance—Appellate Division	84	62
Opinion—Appellate Division	85	62
Order of Special Term correcting title of proceedings	86	63
Stipulation waiving certification	87	63
Remittitur of Court of Appeals	89	64
Order on remittitur	93	66
Clerk's certificate (omitted inprinting)	95	
Order extending time to file petition or writ of certiorari	96	67
Order allowing certiorari	97	67

[fol. 1]

IN SUPREME COURT OF NEW YORK

Appellate Division—First Judicial Department

In the Matter of the Application of Rose Halvey, Relator-Appellant, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant-Respondent.

Statement Under Rule 234

This is an appeal by Rose Halvey, the relator, from an order of the Supreme Court of the County of New York, dated June 18, 1945, and filed in the office of the Clerk of the County of New York on June 19, 1945, and involves the custody of John Arthur Halvey, the seven year old son of the said Rose Halvey and the defendant John F. Halvey. The order appealed from was made in the above entitled proceeding. The decision was rendered by the Honorable Felix C. Benvenga, one of the Justices of the Supreme Court of the State of New York.

This proceeding was commenced by the filing on or about May 1, 1945, of a petition by the said Rose Halvey for a writ of habeas corpus directed to the defendant-respondent, John F. Halvey, for the purpose of inquiring into the cause of the imprisonment and restraint of the said John Arthur Halvey, and of delivering him therefrom.

[fol. 2] On May 2, 1945 a writ of habeas corpus, returnable the 4th day of May, 1945, was allowed by the Honorable Justice Felix C. Benvenga.

A return to the said writ of habeas corpus, verified by the said John F. Halvey, on the 3rd day of May, 1945, was thereafter filed.

The said Rose Halvey appeared in the proceeding herein by her attorneys, Rosenberg & Rosenberg, and the said John F. Halvey appeared in the proceeding by his attorney, Isidore Cohen, Esq.

There are no other parties to this proceeding. There has been no change in the parties nor in their respective attorneys except that, pursuant to a stipulation filed in the office of the Clerk of the County of New York on or about July 2, 1945, the firm of Mitchell, Capron, Marsh, Angulo & Cooney, has been substituted as attorneys for the Relator-

Appellant, in the place and stead of the said firm of Rosenberg & Rosenberg.

The issues raised by the return to the writ were tried before Honorable Justice Filix C. Benvenga of the Supreme Court, at a Special Term, Part II of the Supreme Court of the State of New York on May 4, 1945. The Justice rendered and filed a written opinion on or about the 31st day of May, 1945 (*Halvey* vs. *Halvey*, 185 Misc. 52). Thereafter the order appealed from was made and entered in the proceeding on or about June 18, 1945. Notice of appeal from the said order was served on Isidore Cohen, Esq., attorney for the defendant-respondent, on July 9, 1945, and filed with the Clerk of the County of New York on July 10, 1945.

[fol. 3] SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—July 6, 1945

Sirs:

PLEASE TAKE NOTICE that the relator Rose Halvey herein appeals to the Appellate Division of the Supreme Court for the First Judicial Department from each and every part of the order of this Court dated June 18th, 1945, and entered on June 19th, 1945, in the office of the Clerk of the County of New York except in so far as the order aforesaid ordered, adjudged and decreed that the custody of the infant child John Arthur Halvey remain with the mother Rose Halvey.

Dated, New York, N. Y., July 6th, 1945.

Yours, etc., Mitchell, Capron, Marsh, Angulo & Cooney, Attorney for Relator, Rose Halvey, 20 Exchange Place, Borough of Manhattan, New York City.

[fol. 4] To Isidore Cohen, Esq., Attorney for Respondent, 150 Broadway, Borough of Manhattan, City of New York.
Clerk of the County of New York.

SUPREME COURT OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—June 18, 1945

A petition having been duly made by the above named ROSE HALVEY, for a Writ of Habeas Corpus, such petition [fol. 5] being duly verified on the 1st day of May, 1945, and a writ having been thereupon duly allowed in the above matter by the Hon. FELIX C. BENVENGA, a Justice of the Supreme Court, and the said Writ having been duly issued by the Clerk of the Court, under its seal, on the 2nd day of May, 1945, and the defendant, John F. Halvey, having been duly commanded by such writ to have the body of the child, John Arthur Halvey, before a Special Term, Part II of the Supreme Court, held at the County Court House, in the Borough of Manhattan, City of New York, on the 4th day of May, 1945, and the defendant, John F. Halvey, having duly appeared and made written return to the said writ, in which he denied certain material allegations of the petition, such return being dated the 3rd day of May, 1945, and the issues thereon having duly come on for hearing at the above captioned time and place, and the body of John Arthur Halvey, having also been produced into court at said time and place, and Messrs. Rosenberg & Rosenberg, having appeared as attorneys for the petitioner, by Irwin H. Rosenberg, of Counsel, and Isidore Cohen, Esq., having appeared as attorney for the defendant, and after hearing the allegations and proofs of the parties, and the Court having interviewed the infant, John Arthur Halvey, in private, and due deliberation having been had, and the Court having made and filed its opinion in writing, it is

ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the custody of the infant child, John Arthur Halvey, remain with the mother, Rose Halvey.

(2) That the father, John F. Halvey, have certain rights of visitation, as follows:

[fol. 6] (a) During each summer vacation period after the year 1945, the said child shall be with the father, commencing on June 23rd, and ending on September 7th of each year and shall live with him during such period in his home in New York.

(b) During the entire Christmas vacation period the said child will be with the father and live with him in his home in New York.

(c) At any time, while the said child lives with the mother, the father shall have the right to visit and have the child with him each afternoon from 2 o'clock until 5 o'clock.

(3) At any of the preceding times when the said child lives with the father in New York, the mother, if then in New York, shall have the right to visit and have the child with her each afternoon from 2 o'clock until 5 o'clock.

(4) At the commencement of each of the aforesaid vacation periods during which the said child is to be with the father, the latter shall go to Florida to get the said child, and the mother shall deliver or make available the said child to the father, at her home in Florida, and the father shall accompany him to New York. At the end of each of said vacation periods, the father, or some other suitable person whom he shall delegate, shall accompany the said child on his return trip to Florida, and shall deliver him to the mother's residence in that State.

(5) That while the child is with the father or with the mother, he shall be provided with a home and there given proper care and attention.

[fol. 7] (6) The child shall remain with the father in New York until July 16th, 1945, when the father shall return him to the mother in Florida, provided that the Surety Company Bond, hereinafter set forth shall have been filed by the mother.

(7) The petitioner, Rose Halvey, is hereby directed to file in the Office of the Clerk of this Court, a Surety Company Bond in the sum of $5,000.00 in form to be approved by the Court, conditioned for the faithful performance of the terms and conditions of this order, and for the delivery of said child by the said petitioner at her home in Florida to the father for removal to this State whenever, under the terms hereof, the father shall have the right to have the said child with him, which bond shall remain in full force and effect so long as this order is in effect; and unless and until the said petitioner, Rose Halvey, files such bond, the petitioner, Rose Halway, shall not be permitted to re-

move said child from the State of New York, and the said child, shall, except during the periods of visitation hereinabove granted to the father, John F. Halvey, remain with the mother, Rose Halvey, in the State of New York.

(8) In the event that the petitioner, Rose Halvey, shall appeal from any portion of this order or from an order of the Appellate Division affirming or modifying this order, then pending the hearing and final determination of any such appeal or appeals, the provision hereinabove set forth requiring the petitioner to give a Surety Company Bond for the faithful performance of the terms and conditions of this order, is suspended upon condition that the petitioner furnish a Surety Company Bond in the sum of $5,000.00 conditioned for the faithful performance of all of the terms and conditions of this order, except the post-
[fol. 8] ing of the bond required in paragraph "(7)", pending such appeal or appeals, with such Surety Company Bond to be cancelled upon the delivery of the said child to the father, John F. Halvey in the event of the final affirmance of the provisions of this order requiring the giving of the Surety Company Bond first mentioned, or in the event of the reversal of this Order or of the provisions of this order requiring the giving of the Surety Company Bond first mentioned.

Enter, F. C. B., *J. S. C.*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of ROSE HALVEY, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant

PETITION FOR WRIT OF HABEAS CORPUS—May 1, 1945

To the Supreme Court of the State of New York:

The petition of ROSE HALVEY respectfully shows to this Court and alleges:

[fol. 9] 1. Your petitioner is a resident of 3590 Crystal View Court, Miami, Florida, where she and the infant child

whose custody is here involved, have resided continuously since April 13th, 1944.

2. The defendant John F. Halvey resides at 303 West 19th Street, and maintains an office for the transaction of business at 2 West 13th Street, both in the Borough of Manhattan, City of New York.

3. That on the 10th day of April, 1937, your petitioner and the defendant were married and they thereafter resided at 303 West 19th Street, in the Borough of Manhattan. John Arthur Halvey, the issue of such marriage, was born on the 4th day of February, 1938, and is now seven years of age.

4. That heretofore and on the 12th day of April, 1944, due to the beatings and other cruel and abusive treatment, which your petitioner had received from the defendant for a number of years, your petitioner separated from the defendant, taking with her her child John Arthur Halvey.

5. Your petitioner and her son John Arthur Halvey, have been residing at the home of your petitioner's sister and brother-in-law, Mr. and Mrs. John J. Hagerty, at 3590 Crystal View Court, Miami, Florida, ever since April 13th, 1944, and your petitioner intends to continue to reside there and to make it her permanent home.

6. By reason of the beatings and other cruel and inhuman treatment which your petitioner received from [fol. 10] the defendant, she duly instituted an action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, against the defendant, in which action she sought a final decree of divorce and the custody of her child John Arthur Halvey. This action was instituted by the filing of a bill of complaint and the issuance on the 22nd day of February, 1945, of an order directing the service of process upon the defendant by publication; service was thereafter effected on the defendant in accordance with the Laws of the State of Florida. Prior to the institution of the said action, the defendant was advised that your petitioner was going to institute such an action and subsequent to its institution, the defendant received notice thereof and your petitioner has been informed and verily believes that the defendant in fact consulted Florida counsel with reference to such action.

7. Your petitioner further alleges that the defendant having failed to answer or appear in the action instituted by your petitioner in the State of Florida aforementioned, a hearing took place before a Special Master on the 16th day of April, 1945, and a report was made by him dated the 18th day of April, 1945, wherein he recommended that a decree be entered granting a divorce to your petitioner and awarding the custody of the child to your petitioner. Upon this report, a decree was duly entered by the Court on the 20th day of April, 1945, in which decree your petitioner was granted a divorce from the defendant and which further provided that

> "It is further ordered adjudged and decreed that the [fol. 11] permanent care, custody and control of the minor child of the marriage, to-wit, John A. Halvey, be and the same is hereby awarded to the plaintiff, Rose Halvey."

8. Your petitioner further alleges that despite the proceedings before the Florida Court hereinabove referred to, the defendant took possession of the child on April 19th, 1945, while he was attending Gulliver's School in Miami, Florida, and without in anywise communicating with your petitioner, and in complete disregard of your petitioner's rights, took the child with him to his home at 303 West 19th Street, in the Borough of Manhattan. Your petitioner thereafter communicated with the defendant and was informed by him that although he had the child at his home, he would not give up the custody of the child, nor would he permit your petitioner to visit the child, despite the decree of the Florida Court awarding the custody of the child to your petitioner.

9. That it is for the best interests of the child that he be continued in the custody of your petitioner. As before stated, your petitioner and her child reside at the home of Mr. and Mrs. John J. Hagerty at 3509 Crystal View Court, Miami, Florida. The home is a large palatial establishment, consisting of ten rooms and three baths on a plot approximately 100 ft. front and rear by 300 ft. deep, fronting on Biscayne Bay. Your petitioner has two rooms and bath for her own use. The child was enrolled at a private school known as "Gulliver's School", with the tuition paid by your petitioner. Your petitioner is a registered nurse and feels fully competent to care for the child.

[fol. 12] 10. That the said child is being kept away from your petitioner by his father wrongfully, forcibly and against the will of the said infant and that the cause of the imprisonment and restraint of the child, is the desire of the defendant to alienate the child's affections from your petitioner.

11. That the said child John Arthur Halvey, has not been committed, nor is he detained by virtue of a mandate issued by a Court or Judge of the United States, nor by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, nor by the final order of such tribunal made in a special proceeding, nor by virtue of an execution or other process issued upon such a judgment, decree or final order.

12. That your petitioner accordingly prays for the issuance of a writ of habeas corpus, for which writ no previous application has been made.

Wherefore, your petitioner respectfully prays that a writ of habeas corpus directed to the defendant John F. Halvey issue for the purpose of inquiring into the cause of the imprisonment and restraint of said John Arthur Halvey and of delivering him therefrom pursuant to the statute in such case made and provided.

Dated: New York, May 1, 1945.

Rose Halvey, Petitioner.

[fol. 13] *Duly sworn to by Rose Halvey. Jurat omitted in printing.*

[fol. 14] IN THE SUPREME COURT OF NEW YORK

WRIT OF HABEAS CORPUS—May 2, 1945

THE PEOPLE OF THE STATE OF NEW YORK

To John F. Halvey, Defendant:

We Command You that you have the body of John Arthur Halvey by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said John Arthur Halvey is called or charged before the Supreme Court of the State of New York, at a Special Term, Part II thereof, appointed

to be held in and for the County of New York, at the Courthouse, Pearl and Center Streets, in the Borough of Manhattan, City of New York, on the 4th day of May, 1945, at 2:00 o'clock in the afternoon of the said day, to do and receive what shall then and there be considered concerning him and have you then and there this writ.

Witness, Hon. Felix C. Benvenga, one of the Justices of this Court, this 2nd day of May, 1945.

Archibald R. Watson, Clerk.

Rosenberg & Rosenberg, Attorneys for Relator, Office and P. O. Address, 295 Madison Avenue, Borough of Manhattan, City of New York.

The foregoing writ is allowed this 2nd day of May, 1945.
Felix C. Benvenga, Justice of the Supreme Court of the State of New York.

[fol.15] SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of ROSE HALVEY, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant

RETURN TO WRIT OF HABEAS CORPUS

John F. Halvey, the defendant in this proceeding and the father of the above named child, for his return to the petition and writ of habeas corpus herein, produces the above named child, John Arthur Halvey, into court, and respectfully:

1. Denies each and every allegation contained and alleged in paragraphs "4", "9" and "10" of the petition herein.

2. Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained and alleged in paragraphs "6", and "7" of the petition.

3. Admits that he took possession of the child on April 19th, 1945, and took him to his home in the Borough of Manhattan, City of New York, and that he refused to give up custody of the child, but denies each and every other allegation contained and alleged in paragraph "8" of the petition herein.

[fol. 16] For a Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

4. That on the face of the petition the court has no jurisdiction of this proceeding by reason of the fact that the petitioner herein is not an inhabitant of this State.

For a Further Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

5. That the petitioner herein did on or about the 12th day of April, 1944, leave this defendant and his home without cause or justification, and without the consent of the defendant, and that she abandoned this defendant and continues to live apart from him, and did on said date take with her the said infant child without disclosing the whereabouts of said child to this defendant, and did remove him from the State of New York; that the said child is now in the custody of this defendant, the father of said child, who is well able to support and care for him.

For a Further Separate Defense Herein and as a Complete Answer to the Writ and Petition Herein, Defendant Alleges:

6. That the petitioner herein is not a fit or suitable person to have custody of the said child, John Arthur Halvey.

Wherefore, defendant demands that these proceedings be dismissed with costs.

(Signed) John F. Halvey, Defendant.

[fol. 17] SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART II

In the Matter of the Application of Rose Halvey, Relator, for a Writ of Habeas Corpus to Obtain the Custody of John Arthur Halvey, now held by John F. Halvey, Respondent

New York, New York, May 4th, 1945.

Statement of Evidence

Before: Honorable Felix C. Benvenga, Justice

APPEARANCES:

Rosenberg & Rosenberg, Esqs., Attorneys for Relator.
Irwin H. Rosenberg, Esq., of Counsel.
Isidore Cohen, Esq., Attorney for Respondent.

MOTION TO DISMISS

Mr. Cohen: I have a preliminary motion I would like to make.

[fol. 18] The Court: Go ahead.

Mr. Cohen: I move to dismiss these proceedings on the ground that the Court has no jurisdiction of the proceedings under Section 70 of the Domestic Relations Law, which provides that such proceedings lie in favor of an inhabitant of the State.

Under the petition, the relator states, in Paragraph First "Your petitioner is a resident of 3590 Crystal View Court, Miami, Florida, where she and the infant child, whose custody is involved, have resided continuously since April 13th, 1944."

She also says, in Paragraph Fifth, that "She has been living at the home of her sister and brother-in-law ever since April 13th, 1944, and your petitioner intends to continue to reside there and to make it her permanent home."

As I understand the plain reading of that section, its purpose is to give relief to inhabitants of the State of New York, not to persons who come into this State from another State with the intention of removing the child to that other State.

The Court: Have there been any cases on the subject? Offhand, it seems a very narrow view to me. However, the section does contain the word "inhabitant".

I will take the motion under advisement, as I will take any other motions here under advisement.

Mr. Cohen: Very well.

Mr. Rosenberg: Shall I proceed, your Honor?

The Court: Yes.

Mr. Rosenberg: Do you wish the witness sworn?

The Court: Yes.

[fol. 19] Rose Halvey, residing at 3590 Crystal View Court, Miami, Florida, the relator, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Mrs. Halvey, you were, were you not, the wife of John F. Halvey?

A. Yes.

Q. And by John F. Halvey, you mean the gentelman seated at the table over here?

A. Yes.

Q. When did you marry him?

A April 10th, 1937.

Q. Where was this marriage contracted?

A. Hastings-On-The-Hudson.

Q. Subsequent to the marriage, where did you live?

A. At 303 West 19th Street.

Q. In what city is that?

A. New York City.

Q. Were there any children born of the marriage?

A. Yes, sir.

Q. How many?

A. One.

Q. A boy or a girl?

A. A boy.

Q. When was he born?

A. February 4th, 1938.

Q. What is his name?

A. John Arthur Halvey.

Q. Subsequent to the birth of the child, did you live with your husband?

A. Yes, sir.

Q. Until when?

A. Until April 12th, 1944.
Q. Will you tell us the reason you left him?
A. Well, he was abusing me.

The Court: What is that?
The Witness: He was abusing me.

Q. When you say "He was abusing me", what do you mean by that?
A. He hit me.
Q. Did he hit you on a single occasion?
A. No; he hit me on numerous occasions.

The Court: What do you mean by "numerous"? How many times?
[fol. 20] The Witness: Fifteen times.
The Court: What is that?
The Witness: Fifteen or more times.
The Court: Fifteen or more times in the course of what period of time?
The Witness: About seven years.
The Court: Seven years?
The Witness: Yes.
The Court: Go ahead.

Q When you say he hit you, do you mean it was a slight slap?
A. No.
Q. Suppose you tell us—describe, if you will, the method in which he hit you?
A. He hit me with his fist, blackening my eyes. I had bruises on my body.
Q. In addition to striking you, was there any other method of abuse adopted by Mr. Halvey?
A. He kicked me.
Q. Did he ever use any obscene language in your presence?
A. Yes, sir.
Q. Was such language used in the presence of the child?
A. Yes, sir.
Q. This course of abuse continued over the period of six or seven years that you have referred to?
A. Yes, sir.
Q. When did that begin, shortly after the child was born?
A. Yes; before, too.

Q. Well, now, had there been any dispute at or about the time you left Mr. Halvey in April of last year?

A. Well——

The Court: What caused you to leave in April, 1944?

The Witness: Because I could not stand it any longer. I was a nervous wreck mentally and physically.

[fol. 21] The Court: What happened just before the date that you left? Had something happened just before you left him?

The Witness; No; it was a continual——

Q. A continual what? Had he struck you?

A. Yes; and he would not talk to me for a couple of weeks at a time.

Q. Did you leave a note when you left him?

A. I did.

Q. What did you tell him?

A. I told him that I couldn't stand it any longer and I had to leave the way I did because if I had told him he would have abused me more, and I told him that my address from then on would be 3950 Crystal View Court, Miami, Florida.

Q. Did you go to Miami immediately after leaving him?

A. Yes.

Q. With whom did you reside at the address you just mentioned in Miami?

A. With my sister and brother-in-law.

Q. When did you arrive in Miami?

A. April 13th, 1944.

Q. You took your son with you?

A. I did.

Q. Have you resided there continuously ever since April 13th, 1944?

A. I have.

Q. Is it your intention to continue to reside in Florida?

A. Yes.

Q. Is it your intention to make Florida your permanent home?

A. Yes.

Q. Until coming back this week, you have never been back to New York, have you?

A. No.

Q. What is the name of your brother-in-law and sister, with whom you reside?

A. Mr. and Mrs. John J. Hagerty.

[fol. 22] Q. Did you in February of this year cause an action to be instituted in Dade County, Florida, for a divorce?

A. I did.

Q. Do you recall the date?

A. What is that?

Q. Do you recall the date upon which this action was started?

Mr. Cohen: I object to all testimony in relation to the proceedings in Florida upon the ground that they are incompetent, irrelevant and immaterial.

The Court: I will take it, subject to a motion to strike it out.

Go ahead, you may answer.

The Witness: It was in February that I went—is that what you said?

Q. Do you recall when in February of this year the action was begun?

A. Was it the 20th?

The Court: February of this year?

Mr. Rosenberg: Yes, your Honor.

The Witness: Yes.

Q. Will it refresh your recollection if I tell you it was on February 22nd?

A. 22nd, yes.

The Court: Have you copies of the decree?

Mr. Rosenberg: I have the decree, your Honor.

The Court: All right, go ahead.

Mr. Rosenberg: It will be conceded, will it not, that there was service by publication, Mr. Cohen, in that divorce proceeding?

Mr. Cohen: No.

The Court: Go ahead, prove your case.

[fol. 23] Q. Did you in this divorce proceeding in Florida attend a hearing on April 16th, 1945 before a Special Master?

A. Yes, sir.

Q. And the question taken up at that proceeding was the custody of the child, was it not?

A. Yes, sir.

Q. Several days subsequent to that, a divorce decree was granted to you, is that correct?

A. Yes.

Mr. Rosenberg: I offer in evidence an exemplified copy of the Florida divorce decree.

Mr. Cohen: Objected to.

The Court: I will take it, subject to a motion to strike it out.

(Received in evidence and marked Relator's Exhibit 1.)

Q. On April 19th, 1945 did you take your son to school?

A. I did.

Q. At about what time?

A. Nine o'clock in the morning.

The Court: What date was that?

Mr. Rosenberg: April 19th.

Mr. Cohen: I don't think the son has been mentioned until this time, except his birth.

The Court: It is mentioned here in the decree.

Mr. Cohen: I mean, she did not say——

The Court: I assume she took the boy.

Q. So that there may be no misunderstanding, Mrs. Halvey, when you went to Florida last April, did you take your son with you?

A. Yes, sir.

Q. I believe you testified before that you enrolled him in September of 1944 in school; is that correct?

A. Yes, sir.

[fol. 24] Q. That was in Miami?

A. Yes, sir.

Q. After you had taken him to school on April 19th at nine A. M., did you thereafter that same day receive a call from the school?

A. Yes, sir.

Q. Were you advised in that telephone call that your son was not there?

A. Yes, sir.

Q. Will you tell us what you subsequently discovered with respect to his absence?

A. They called me up and told me——

Q. Who do you mean by "they"?

A. The school teacher called me and told me that Johnnie had gone——

Mr. Cohen: It is hearsay, your Honor. If you want it, all right.

The Court: It doesn't make any difference.

The Witness (Continuing): That Johnnie had gone and his father had taken him.

I said, "Who?"

She said, "His father."

I said, "How do you know it is his father?"

She said, "He said he was."

We contacted——

The Court: You went to the school pursuant to the telephone conversation?

The Witness: This was the telephone conversation.

The Court: You had a conversation with whom?

The Witness: The school teacher.

The Court: As a result of the conversation you had with the school teacher—What is her name?

The Witness: Mrs. McDermott.

The Court: What did you do as a result of that conversation?

[fol. 25] The Witness: I went up to the school. We contacted Mr. Hendricks.

The Court: Who is Mr. Hendricks?

Mr. Rosenberg: He is a Miami attorney.

The Court: You had a talk with him?

The Witness: I told him what happened. I went up to the school and wanted to know who took Johnnie and she said, "His father."

I said, "What did he look like?"

Q. Did you thereafter call New York City by telephone for the purpose of determining where the boy was?

A. Yes.

Q. When did you call New York, and whom did you speak to?

A. Well, we called——

Mr. Cohen: Not "we" but you.

The Witness: I called different people and then contacted this party that called up 309 West 19th Street, and they told us that—and they called me back and told us that little

John had answered the telephone. So, we called—my sister called. I was listening in on the extension.

Q. Just to cut this short——

The Court: I think most of it is hearsay.

Q. Did you speak to Mr. Halvey?

A. I spoke to him.

Q. On what day did you speak to him?

A. On Sunday.

Q. April 22nd?

A. Yes.

The Court: What date is that?

The Witness: Sunday, April 22nd.

[fol. 26] Q. Where was Mr. Halvey when you spoke to him?

A. He told me he was in Bay Ridge, Brooklyn.

Q. Did he tell you that he had the boy here with him?

A. He told me, yes.

Q. Did he tell you that he had taken the boy from Miami Beach?

A. Well, he did not tell me he took him; he said he had him here.

Q. When you lived here in New York with Mr. Halvey, will you describe in a general way the nature of your living accommodations here?

A. We had a four-room apartment on 8th Avenue, corner of 8th Avenue and 19th Street.

Q. Do you know how much the rental was for that apartment?

A. I think it was around $55—yes, $55 a month.

Q. Did you have any servants?

A. No, sir.

Q. In Miami, you say you are making your permanent home with your sister?

A. Yes, sir.

Q. Will you describe, please, the type of home in which you live in Miami with your sister?

A. We have a very big home, a ten-room home, right on the Bay. The house has a bay frontage of about 100 feet, with 300 feet of ground.

Q. Are there any servants in the home?

A. Yes, sir; we have two.

Q. Did your son attend a public or a private school?
A. A private school.
Q. Who paid for his tution?
A. I did.
Q. Since you left your husband in April of 1944, have you received any money from him?
A. No, sir.
Q. For yourself?
A. No, sir.
Q. Has he sent any money for the support of the child?
A. No, sir.
Q. What was your occupation prior to your marriage to Mr. Halvey?
A. Registered nurse.
[fol. 27] Q. For how many years had you been a registered nurse?
A. About sixteen years.
Q. You want to have the custody of your child, is that correct?
A. Yes, sir.

Mr. Rosenberg: You may inquire.

Cross-examination.

By Mr. Cohen:

Q. Were you happy during the first year of your married life?
A. Yes.
Q. You had known the defendant for ~~several years~~ before marriage?
A. Yes, sir.
Q. In fact, I think it is ten years, isn't it, that you went with him?
A. Perhaps.
A. Yes, sir.

The Court: Before being married?
Mr. Cohen: Before they were married.

Q. You were married in the State of New York?
A. Yes, sir.
Q. He had his business in the City of New York?
A. Yes, sir.
Q. What business was he in?

A. Trucking business.
Q. Under the name of the Halvey Trucking, Inc.?
A. Yes, sir.
Q. He had other interests besides, hadn't he?
A. Yes.
Q. What?
A. A garage on West 19th Street.
Q. Who owns that building?
A. I believe so.
Q. After the first year of your marriage, did anything occur with respect to your habits that caused him to be displeased?
A. I had no bad habits that I know of.
Q. Well, did you drink occasionally?
A. Socially; a few drinks.
Q. Did you drink alone, too?
A. No.
Q. Besides socially?
A. No, sir.

[fol. 28] Q. Isn't it a fact that you drank a good deal of beer and other intoxicating liquors?
A. I had an occasional glass of beer. I very seldom drank anything else.
Q. Very seldom drank anything else?
A. That is right.
Q. But, you did drink a good deal of beer?
A. I drank some beer.
Q. What would you say?
A. About two glasses of beer.
Q. Two glasses of beer?
A. Yes.
Q. When? What do you mean, two glasses of beer? In your entire lifetime?
A. No; once in a while.
Q. Once in a while?
A. Yes.
Q. Did you drink a whole afternoon?
A. No, sir.
Q. Did Mr. Halvey ever come home and find that you had friends in the house, or relatives, and you were all drinking beer?
A. On occasion, if I had guests, several glasses of beer.

Q. Did you object to his coming home, or express your disapproval of the fact that he came home and was interfering with your party?

A. No, sir.

Q. Never did?

A. No, sir.

Q. You never called him any names or abused him, did you?

A. No, sir.

Q. You never got drunk in your life, did you?

A. No, sir.

Q. Never did?

A. No, sir.

Q. How many meals did you cook for your husband during the past three years of your married life? I mean, during the three years prior to April 13th, 1944?

A. That I would not know. I never knew when Mr. Halvey was coming home in the evening. If I had dinner, he [fol. 29] would probably come in at nine or nine-thirty, ten or ten-thirty in the evening, and I told him if he could try and get home earlier than that, we would have dinner. He never did. I had dinner for my son, and I had dinner for myself.

Q. Did not he find fault with you because you did not prepare meals for both himself and his son?

A. He did not find fault. He would not come home to eat.

Q. He would not come home to eat?

A. He would come home at all hours of the night.

Q. Well, isn't it a fact that after your habits became——

Mr. Rosenberg: I object to the form of that question as assuming something not in evidence.

The Court: Reframe the question.

Q. Did Mr. Halvey come home on many occasions and find that you had been drinking?

A. No, sir.

Q. And were unfit and unable to stand on your feet?

A. No, sir.

Q. Did he have to help you to bed many times?

A. No, sir.

The Court: Did he have to help you to bed at any time?

The Witness: No, sir.

Q. Never?
A. No.
Q. Isn't it a fact that Mr. Halvey found his home——

Mr. Cohen: I withdraw that question.

Q. Did you go out to market for the family?
A. Yes, sir.
[fol. 30] Q. How often?
A. Whenever I had occasion to do it.

The Court: Every day?
The Witness: Every day.

Q. Did you ever visit Duffy's Tavern on 14th Street?
A. I was there, yes.
Q. How often did you go there?
A. Maybe on Sunday afternoon two or three of us would go there and have a couple of glasses of beer; a couple of ladies I knew.
Q. Only on Sunday?
A. Yes.
Q. Never on weekdays?
A. Never.
Q. During, let us say, the year prior to April 13th, 1944, how many meals did you prepare for your husband?
A. Whenever he came home for dinner he had a meal.
Q. You prepared his meal?
A. Yes, sir.
Q. What did you prepare?

Mr. Rosenberg: I object to that question.
The Court: Did your husband have breakfast in your home?
The Witness: Yes.

Q. Every morning?
A. As a rule.

The Court: Did he have breakfast with you and the boy?
The Witness: Well, yes.
The Court: And, did you prepare that breakfast?
The Witness: I did, or he did sometimes.
The Court: As a rule, who did?
The Witness: I did at times, and at times Mr. Halvey would do it.
The Court: What did breakfast consist of?

[fol. 31] The Witness: Coffee, toast——

The Court: What is that?

The Witness: Coffee and toast and eggs—anything he wanted.

The Court: What about lunch? Who prepared lunch?

The Witness: He didn't come home. I prepared Johnny's lunch and my own.

The Court: What about supper?

The Witness: Supper, I had Johnny's supper and my own. As I say, Mr. Halvey came home——

The Court: What time did you have supper?

The Witness: As a rule, six o'clock.

The Court: Six o'clock?

The Witness: Yes.

The Court: In other words, you are in the habit of eating at six o'clock, you and your son?

The Witness: Yes.

The Court: If Mr. Halvey was not home, what was the procedure; you would eat, anyhow?

The Witness: Yes. As a rule, I never knew when he was coming home; it was all hours.

The Court: All right; go ahead.

Q. He had a business, didn't he?

A. Yes, sir.

Q. Did you know where it was?

A. 13th Street—2 West 13th Street.

Q. The trucking company had an office in that building, did it not?

A. Yes, sir.

Q. It was an office building?

A. Yes. sir.

Q. How far was that from your home?

A. Six blocks, I imagine.

[fol. 32] Q. Isn't it a fact he had two girls working there?

A. I believe so.

Q. You have been in the office, haven't you?

A. Sometimes it was one, sometimes it was two. I don't know how many he has now.

Q. What time did they leave?

A. I don't know.

Q. What time did he leave?

A. I don't know.

Q. What time did Mr. Halvey leave in the morning?

A. Sometimes nine, sometimes nine-thirty, ten, ten-thirty, eleven.

Q. Were you ever in bed when he left?

A. Sometimes.

Q. Wasn't it always?

A. No.

Q. Your sister, the one that lives in Florida, is married to Mr. Hagerty?

A. Yes, sir.

Q. Mr. Hagerty is a wealthy man?

A. I presume so.

Q. He is an elderly man, isn't he?

A. Yes. Well, he is sixty-seven or sixty-eight, I believe—something like that.

Q. Your sister married him after attending him as a trained nurse?

A. Yes, sir.

Q. And then he went to Florida to live?

A. Yes, sir.

Q. He has grown children that live in New York?

A. I believe he has.

Q. This house that you refer to, this ten room house, is his home, is it not?

A. Yes; my sister's, too.

Q. How long is your sister married to him?

A. About eight years.

Q. They give you an apartment rent free, is that the idea?

A. I live right in the house. We have two rooms and a bath.

Q. Do you pay any rent for that?

A. No, sir.

Q. Did your sister urge you to come and live with her?

A. When my sister found out I was abused so much——

[fol. 33] Q. Will you answer the question, please?

A. Yes.

The Court: Did your sister ask you to come down and live with her? Is that it?

The Witness: Yes, sir.

Q. Do you do any of the work in the house?

A. I pitch in once in a while, when we might not have a maid for a day or two.

Q. There is a shortage of help in Florida?
A. After a fashion.
Q. Your sister needed assistance, isn't that why she asked you to come down?
A. No, sir.
Q. Does your sister drink, too?
A. No, sir.

Mr. Rosenberg: Wait a minute. I object to the question and move to strike out the answer.

The Court: Well, it is in.

Mr. Rosenberg: Pardon me?

The Court: I will strike it out if you want to. She said, "No."

Q. Did you drink with your sister while your boy was there?
A. We probably had an occasional glass of beer.
Q. Probably?
A. Yes.
Q. Don't you know?
A. An occasional glass of beer.
Q. You drank with your sister, didn't you?
A. A glass of beer.
Q. Not more than one glass?
A. As a rule, no.
Q. You drank in the presence of the boy?
A. Yes.
Q. Did you pay any rent for the home? Did you pay any rent for your home down in Florida?
A. No, sir.
[fol. 34] Q. Did you ever ask Mr. Halvey to contribute to the support of your boy?
A. No, sir.
Q. Or to yourself?
A. No, sir.
Q. Did you tell him in advance of your leaving New York that you were going?
A. I did not tell him in advance, no.
Q. Did you tell him you were going to take the boy?
A. No.
Q. Who took care of the boy while he was in New York?
A. I did.
Q. On Saturday and Sunday, who took care of the boy?

A. I took care of him on Saturday, and I took care of him on Sunday. His father took him out for maybe two or three hours on a Sunday afternoon. That is the only time I go away from that little boy.

Q. The only time you went away from him?

A. That's the only time I ever had that I was away from him.

Q. Did you want to get away from him?

A. I mean, the only time I was ever away from him was on Sunday afternoon for two or three hours. Mr. Halvey used to take him out.

Q. You had him on your hands all the time, is that right?

A. I didn't have him on my hands. He was my son, and I took care of him.

Q. He was not a burden to you?

A. No.

Q. There is no assurance that your sister will always want you and your son to live with her, is there?

A. Yes, sir.

Q. There is an assurance?

A. Yes, sir.

Q. What assurance?

A. She wants us there.

Q. Just her word, is that right?

A. What more assurance do you want?

Q. She may change her mind?

Mr. Rosenberg: I object to the question.

The Court: It is argumentative.

[fol. 35] Q. On Saturday afternoons, when you went to Duffy's Tavern——

A. I never went on Saturday afternoons.

Q. When did you go?

A. I went Sunday afternoon.

Q. Sunday afternoons?

A. Yes.

Q. That was the time you say you got rid of the boy?

Mr. Rosenberg: I object.

The Witness: I was not rid of the boy.

The Court: I don't know what you mean by that.

Mr. Cohen: I am using her own language.

The Court: Reframe the question.

Mr. Rosenberg: That is not her language; that is your language:

The Court: Strike it out; reframe your question.

Q. Were you there all afternoon on Sunday?
A. No, sir.
Q. How much of the day were you there?
A. Maybe an hour.
Q. Every Sunday?
A. Not every Sunday; an occasional Sunday.
Q. Whom did you go with?
A. Two women friends of mine.
Q. Did you ever have the boy there?
A. No. I think once he came in. It is a nice, respectable place. It is a restaurant.
Q. He came in of his own accord?
A. I was with him.
Q. You brought him with you?
A. He came in.
Q. Only once?
A. About once.
Q. About once? Was it more?
A. Well, once that I can recall.

[fol. 36] Q. You don't want your husband to have custody of this child at any time during the year, do you?

A. Well, I would like to have him. He is small. I would like to have him. I feel that I am perfectly able and everything to take care of that little fellow while he is small, and have a home life. When the child gets bigger, if he wants to go with his father, that will be up to him. If Mr. Halvey wanted him down in Florida, that is, in the event that you say I would have the boy, he could come down at any time he pleased, take Johnnie out any time he pleased, have dinner with him, bring him home in the evening; and if I come to New York, he could——

Q. You don't intend to come to New York, do you?
A. If I come to visit——
Q. You said you had no intention of coming to New York.

Mr. Rosenberg: Wait a minute. I object to the question as argumentative.

The Court: I will let her answer it. If counsel doesn't do it, I will do it.

Q. Do you ever intend to come back to New York?
A. No.

The Court: If you ever come back it will be on a visit?
The Witness Yes.
The Court: To whom?
The Witness: Well——
The Court: Who is here outside of Mr. Halvey that you know?
The Witness: I have friends.
The Court: You have?
The Witness: Yes.
The Court: How many?
[fol. 37] The Witness: Oh, about six or seven friends that I could stay with.

Q. You haven't done any work since you have lived down there, have you? I mean, you say you support your son as a registered nurse in your petition.

Mr. Rosenberg: Pardon me. There is no such statement in the petition. I object to the form of the question.
The Court: Reframe the question.
The lady says she does not work and that both she and the son are being supported by the sister or the brother-in-law, or both of them.

Q. That's quite plain, you haven't worked since you left?
A. I work in the house, after a fashion.
The Court: You are not being paid for what you do?
The Witness: Yes, sir; I get a salary.
The Court: From whom?
The Witness: My sister.
The Court: Your sister gives you a salary for what you do there?
The Witness: I get $35 a week.
The Court: A week?
The Witness: Yes.
The Court: What do you do for it?
The Witness: I manage the house and look after the maids, and I do the shopping, and I do things like that, you know, sew on a few buttons—things like that.
The Court: Do you have to pay for the tuition of your son at school?

[fol. 38] The Witness: I pay for that.

The Court: How much?

The Witness: Around $18.75 a month.

The Court: How much?

The Witness: About $18.75 a month.

The Court: You said "About."

The Witness: It is $18.75 a month.

The Court: Have you a bank account?

The Witness: I have; yes, sir.

The Court: In what bank?

The Witness: The Florida bank.

The Court: Where?

The Witness: In a Florida bank.

The Court: What is the name of it? Is there only one bank in Florida?

The Witness: I think it is the DuPont.

The Court: Is it a savings bank?

The Witness: Yes, sir.

The Court: Have you the bank book with you?

The Witness: No, I have not.

The Court: Do you buy your son's clothes?

The Witness: Some of them I do; some of them Mrs. Haggerty buys.

The Court: How does your sister pay you, by check?

The Witness: By cash.

The Court: By cash?

The Witness: Yes.

The Court: How much money have you in the bank?

The Witness: I have over $500 now.

The Court: You have accumulated that money while you have been out there working for your sister?

The Witness Yes, sir.

The Court: Do you buy your own clothes?

[fol. 39] The Witness: Well, I dress in slacks pretty much and I don't spend very much on clothes, your Honor.

The Court: Have you any present intention of living anywhere else but in Florida?

The Witness: No, sir; I intend to make that my home.

The Court: You intend to live there?

The Witness: Yes.

The Court: You started your action in February, 1945, is that right?

The Witness: Yes, sir.

The Court: When did you first go and see a lawyer with respect to a divorce?

The Witness: When?

The Court: When?

The Witness: I imagine it was probably a month before, something like that.

The Court: A month before?

The Witness: Yes.

The Court: When did the idea of a divorce occur to you?

The Witness: When did the idea——

The Court: Yes.

The Witness: Well, I knew I could never live with Mr. Halvey again, and I just thought I would get a divorce.

The Court: Have you any present intention of being married?

The Witness: No, sir.

The Court: Do you mind telling me what your religion is?

The Witness: Catholic.

The Court: Your boy is a Catholic, too?

The Witness: Yes.

The Court: He is brought up in the Catholic religion?

[fol. 40] The Witness: Yes.

The Court: This private school that he goes to, is that a religious school?

The Witness: No; it is a private school.

The Court: It is a private school?

The Witness: Yes.

The Court: It is not a Catholic parochial school, is it?

The Witness: No.

The Court: Does he go to church?

The Witness: Well, yes; we go to church on Sunday, St. Peter & Paul's Church.

The Court: What is the name of the church?

The Witness: St. Peter and Paul.

Q. Do you take the child to church?

A. Yes, sir.

Q. On Sundays?

A. On Sundays.

The Court: How often do you take him?

The Witness: I take him as often as I can. Not every Sunday. I take him occasionally.

The Court: Occasionally? How often do you go to church?

The Witness: Well, I go about three times a week—maybe three Sundays out of a month.

The Court: Out of a month?

The Witness: Out of a month.

The Court: How far is the church from your home?

The Witness: It is quite a distance. We have to use the car.

The Court: When did the boy start to go to school for the first time?

The Witness: He started in September.

The Court: In 1944?

[fol. 41] The Witness: Yes, sir.

The Court: Did he go to school before that date?

The Witness: Well, no.

The Court: When did he go to school?

The Witness: He went the day school opened.

The Court: Let me ask you this question: Did the boy go to school before you left your husband?

The Witness: No, sir.

The Court: He was too young for that?

The Witness: Yes.

The Court: At the time you left your husband, how old was the boy?

The Witness: He was six in February. I left in April.

The Court: He started school in September, 1944?

The Witness: Yes.

The Court: How old was he when he started school?

The Witness: He was six and a half.

The Court: What is that?

The Witness: Six and a half.

The Court: Was not that a little late to start a boy in school?

The Witness: They won't take them until they are six. You have that half a year, you see, and you either send him to a kindergarten or you keep him home.

Q. Outside of this bank account, have you any other moneys? Have you any other properties?

A. No, I have not. I have nothing.

Q. What did your husband give you per week?

A. As a rule I got $25 a week. That wasn't everything.

[fol. 42] Q. Didn't he give you $35 a week?

A. No, sir.

Q. And pay all the expenses of the household?

Mr. Rosenberg: I object to the form of the question.
The Witness: He did not.
Mr. Rosenberg: I object to the form——
Mr. Cohen: May I——
Mr. Rosenberg: I object to the form of the question. Counsel is testifying.
Mr. Cohen: I am cross-examining.
The Court: You may answer it.

Q. Tell us what was the arrangement between yourself and your husband with respect to household expenses? How much did he give you?
A. He gave me $25 a week.

The Court: $25 a week?
The Witness: Yes.
The Court: That was for what purpose? To buy food?
The Witness: For food, and buy Johnnie little things, stockings and underwear, and things like that.
The Court: Let me ask you this: You have no complaint in so far as his supplying you with money for household expenses, and otherwise is concerned; is that it? You don't claim that he failed to support you, do you?
The Witness: Well, he gave me $25 a week. That was all I had. That's all he gave me.
The Court: Was that sufficient?
The Witness: There were times when I would have to ask him for a little more.
The Court: Naturally. Did he object to giving you any more than $25 when you did ask?
[fol. 43] The Witness: No. When I asked he gave it to me.
The Court: In so far as support is concerned, you have no complaint against him?
The Witness: No.
The Court: Your complaint is that he treated you badly, or abused you?
The Witness: Yes, sir.
The Court: That's the reason why you left?
The Witness: Yes.
The Court: All right.
Did he ever abuse your boy?
The Witness: No, sir.
The Court: He did not?
The Witness: No, sir.

The Court: Would you say he loved your boy as a father does love a child?

The Witness: He loves him. He used to keep him up awfully late at night, twelve and one o'clock. He would read him stories, and stuff like that.

The Court: He did?

The Witness: Yes.

The Court: Did you object to that?

The Witness: Yes, I did.

Q. He opened a charge account for you in Wanamaker's, didn't he?

A. Yes.

The Court: What is that?

The Witness: I had a charge account in Wanamaker's.

Q. You could buy anything you pleased?

The Court: I could, I think, make a finding there is no question about support.

[fol. 44] Mr. Cohen: The purpose is to show the means of the respective parties.

The Court: I don't think it makes any difference. Even if I should find that this man is more wealthy, it makes no difference in so far as custody is concerned.

Mr. Cohen: Except that financial ability may enter into it if the boy is going to be destitute.

The Court: I don't think he is going to be destitute.

Mr. Cohen: If he is going to live on the whim of a sister——

The Court: I will take that into consideration.

Mr. Cohen: That's all. I have no further questions.

Redirect examination.

By Mr. Rosenberg:

Q. Mrs. Halvey, there have been a considerable number of questions asked on cross-examination with respect to your drinking habits. Tell me, are you in the habit of drinking hard liquors to excess, and I am not referring to beer at the moment?

A. No, sir; I rarely drink hard liquors, very rarely.

Q. Have you any recollection of ever having been drunk through the drinking of hard liquors?

A. No, sir.

Q. Were you a frequent drinker of scotch or rye, or liquors of that sort?

A. No, sir.

Q. This beer drinking that has been discussed, what did it consist of, drinking an occasional glass of beer?

A. Drinking an occasional glass of beer; having some friends come in and having a glass or two of beer, that's all.

[fol. 45] The Court: How often would the friends come in during the week?

The Witness: Once in a while.

The Court: What do you mean?

The Witness: It might have been once a week, and it might have been twice a week.

The Court: When he came in, would beer be in the house?

The Witness: I had beer in the icebox as a rule, yes.

The Court: Bottled beer?

The Witness: Yes, sir.

The Court: Did you buy the beer by the bottle or by the case, or how?

The Witness: By the bottle.

The Court: By the bottle?

The Witness: Yes.

The Court: How many bottles did you buy, one at a time?

The Witness: No. I probably would buy three, four or five. I would have them in the ice-box.

The Court: You always had some beer in the ice-box?

The Witness: In the ice-box.

Q. These weren't drinking parties, were they?

A. No, sir.

Q. You had people in and you had conversation and a glass of beer to go with it?

Mr. Cohen: Do you want to testify, counselor?

Mr. Rosenberg: I am trying to emulate your fine example, sir.

The Court: What about these visits to Duffy's Tavern? Did you go there every Sunday?

[fol. 46] The Witness: Not every Sunday; once in—you know——

The Court: How many beers would you have?

The Witness: Probably two or three.

The Court: How long would you stay there?

The Witness: Probably an hour or an hour and a half. There would be three or four of us ladies and we would talk.

The Court: What would happen to the boy?

The Witness: Sometimes his father would take him out on Sunday afternoon.

The Court: You didn't go there during the week, did you?

The Witness: No, sir.

The Court: What kind of a place is Duffy's?

The Witness: A nice place. It is a nice restaurant. It is a very respectable place.

Q. You say you prepared dinner each evening, is that right, Mrs. Halvey?

A. Yes, sir.

Q. For yourself and the boy?

A. Yes.

Q. If Mr. Halvey was home, did you prepare it for him as well?

A. Yes, sir.

Q. You said before, as I recall, that Mr. Halvey's habits with respect to returning home were irregular?

A. Yes, sir.

Q. How late at night did Mr. Halvey return home, on some occasions?

A. It would be ten, ten-thirty, eleven-thirty.

The Court: That was on account of business, was it?

The Witness: I don't know. I assume so.

The Court: All right.

[fol. 47] Q. On the nights he was home——

The Court: There is no woman involved, so far as he is concerned?

The Witness: No.

The Court: So far as you know?

The Witness: No.

Q. The nights he was home, you prepared dinner for him, is that correct?

A. Yes.

Q. Did you ever refuse to prepare dinner for him?

A. No, sir.

Q. Are you and your sister approximately the same age?

A. About two years' difference.

Q. What are your respective ages?
A. I am 44 and my sister——

The Court: What is that?
The Witness: I am 44 and my sister is 46.

Q. Is the relationship between you and your sister a close one?
A. Well, yes. We have been together pretty much. We trained together.

The Court: Have you any other sisters?
The Witness: Yes; I have one in Brooklyn.
The Court: In Brooklyn?
The Witness: I have two sisters in Canada, older sisters.
The Court: Is your father and mother alive?
The Witness: My father is alive; my mother is dead.
The Court: Where is your father?
The Witness: He is in Norwich, Connecticut. He is ninety-four years old.
The Court: With whom does he live?
The Witness: With my brother and his nephew and his wife.

[fol. 48] Q. Your sister did not invite you to Florida to be her servant, did she?
A. No, sir.
Q. What is your status in the home? Are you a member of the household or are you a servant there?
A. I am a member of the household.

The Court: But, you are paid for whatever you do there, $35 a week?
The Witness: Yes.
The Court: You don't pay for the food you eat in the house, do you, Mrs. Halvey?
The Witness: No, sir.

Q. You have a complete maintenance, is that correct?
A. That is right.

The Court: Who pays you, your sister or your brother-in-law?
The Witness: Well, my sister.
The Court: Your sister?
The Witness: Yes.
The Court: Do you really get paid?
The Witness: Yes.

The Court: Tell the truth?
The Witness: Yes.
The Court: You do?
The Witness: Yes, sir.
The Court: You mean that?
The Witness: That's right.
The Court: That's all.
Mr. Rosenberg: That's all.

Recross-examination.

By Mr. Cohen:

Q. Mrs. Halvey, Mr. Halvey had a bungadow in Rockaway, didn't he?
A. Yes, sir.
Q. And you spent your summers there?
A. Yes, sir.
[fol. 49] Q. Did you do any drinking out there?
A. No, sir; not any more than I did any place else.
Q. What did you do with the empty bottles when you finished?
A. Brought them back to the store.
Q. Did you ever throw them under the building?
A. No, sir.

The Court: At Far Rockaway?
Mr. Cohen: At Rockaway; yes.

Q. Did any of the neighbors ever have to come into the house and subdue you?
A. No, sir.

Mr. Rosenberg: Wait a moment. I object to it.
The Witness: No, sir.
Mr. Rosenberg: I object to the question as improper in form.
The Court: It has been answered.

Q. Did you ever get drunk in Rockaway?
A. No, sir.

The Court: You have never been drunk in your life?
The Witness: No, sir.
The Court: That's your position?

The Witness: Yes.
The Court: All right.

Q. This sister that is in New York, that lives in New York——
A. Yes, sir.
Q. Did she ever visit you at the house?
A. Yes, on occasion.

The Court: Do you mean in New York?
Mr. Cohen: In New York.

[fol. 50] Q. Did she observe the relations between you and your husband?
A. That I would not know.
Q. Didn't she know something about your habits?
A. No, sir. I saw her——

The Court: Was she ever at home when your husband abused you?
The Witness: She saw him hit me once.
The Court: Once?
The Witness: Yes.

Q. Didn't she live with you one summer, one entire summer in the bungalow?
A. Yes, she and her young baby.

The Court: Where is that sister now? Is she still in Brooklyn?
The Witness: In Brooklyn.

Q. Could you get her here?
A. What is that?
Q. Would you get her here?
A. Yes, if she wants to come.
Q. If she wants to come?
A. I can't make her.

The Court: What is that?
The Witness: I can't make her. I say, if she wants to come.

Q. Did she ever accuse you of being a dipsomaniac?
A. No, sir.

Mr. Cohen: That's all.
The Witness: How would she know, sir?

Q. How would she know?
A. Yes.
Q. Didn't she live with you?
A. Yes. Who is to know. You can't say a person is a dipsomaniac.

The Court: Well——
The Witness: That takes a lot more than her to tell that. That's an unfair question.

[fol. 51] Q. Isn't she also a registered nurse?
A. She is. She still is in no position to say that anyone is a dipsomaniac.
Q. Did she say it?
A. If she did, I don't know it.
Q. Did your sister ever tell you that you were a dipsomaniac?
A. Not that I know of. She never told it to me.
Q. Did your sister ever see you drunk?
A. No, sir.

Mr. Cohen: That's all.
The Court: All right, madam.
Is that your case?
Mr. Rosenberg: That's the plaintiff's case.
Mr. Cohen: I renew the motion made at the outset, upon the same grounds then urged.
The Court: I will take the motion under advisement.

Mr. Cohen: Mr. Halvey.

JOHN F. HALVEY, residing at 303 West 19th Street, Manhattan, New York, the respondent, called as a witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. How old are you?
A. Fifty seven years old.

Q. You went with your wife for about ten years before marriage?

A. Yes, sir.

Q. Did she——

The Court: What is the date of the marriage?

[fol. 52] Mr. Rosenberg: April 10th, 1937, sir.

The Court: All right.

Q. The boy was born on February 8th, 1938?

A. February 4th, 1938.

Q. February 4th, 1938?

A. Yes.

Q. You lived with her at that time at 303 West 19th Street?

A. 300 West 19th Street. No, at 300 West 21st Street. 21st Street is where we lived when the child was born, if that makes any difference.

Q. Will you state when there was any trouble between you and your wife for the first time?

A. I should judge about three years back. I used to come home—do you want me to tell the——

The Court: Three years after the child was born?

The Witness: About two years after the child was born. I would come home at night, my wife would be intoxicated, without any question of doubt, and at times she would get in a fighting pose immediately, and I would have to try to get her into bed. She would fight her way clear. She wouldn't go to bed. She used the worst language that ever came out of a woman's mouth, called me the most vile names and the most indecent language in the presence of that child, told me to go out and get plastered, that it would do me all the world of good, and to go out and get myself laid.

She refused to perform any of the duties of a married woman. She refused to cook for me. There was never anything in the icebox.

All this talk about my being late—I was within walking [fol. 53] distance. I finished my work at 238 West 19th Street, which was directly across the street from where I lived, and that was the purpose of my living there, to be within walking distance of my home. There was never anything in that icebox to eat. That woman definitely refused to cook a meal or do anything or perform any of her duties. The house was filthy and dirty. She was in a state of

drunkenness,—she was asleep when I came home, in bed when I left in the morning.

It was my thought that when she went to Florida, she departed, left a note that she was leaving; by the time I read the note, she abandoned her home. But, she did say "I will be back."

Mr. Rosenberg: Wait a moment.

The Court: She did not say——

The Witness: She said, "I will return."

The Court: What did she say in the note?

The Witness: I have the note. Do you care to read it? That's note No. 1.

The Court. Do you offer it in evidence?

Mr. Cohen: I have no objection.

The Witness: Is that your writing?

The Court: Just a minute. Is that the note?

Mr. Cohen: While they are looking at that, I have a case in 77 Miscellaneous that I would like your Honor to read.

The Court: I will take that later. On what question?

Mr. Cohen: On the question of whether or not the provision of a final decree of divorce is conclusive or not.

The Court: What is the name?

Mr. Cohen: Ex Parte Stuart, 77 Miscellaneous 524.

[fol. 54] Mr. Rosenberg: No objection, sir. I do want to point out, however——

The Court: Just a minute. Did you write that? That is your handwriting? "I had to get away—will be back." That is part of your handwriting?

Mrs. Halvey: Yes.

The Court: Mark it in evidence.

(Received in evidence and marked Respondent's Exhibit A.)

Mr. Rosenberg: A part of the exhibit is covered on the fourth page. There has been something pasted over it on the fourth pages.

The Court: You can read right through it. Do you want your client to write over it so there will be no question about it? What is this pasted over there?

The Witness: That's the way I got the note. It stuck to the flat of the envelope. It is easy to remove. It is just the tissue of the envelope.

The Court: I think you can almost read through it. It doesn't make any difference. Is that what you wanted to call attention to?

Mr. Rosenberg: Yes.

The Court: I will have to read it again. I went through it very fast. Go ahead.

Q. Tell us, if you please, when these incidents that you refer to took place?

A. Daily—it was a daily occurrence. The woman was constantly drunk from the time—she was never out of bed when I left in the morning. She never gave me my breakfast. If I got any breakfast, I got it myself. I never could come for supper, there was nothing in the icebox. I went to a butcher shop, purchased the meat, bought it, and put it in the icebox.

[fol. 55] It got so bad that I had to take that child out to eat at night. I would come home at night and say "Did you eat?"

He would say, "No."

I had to take him out and take him to a restaurant. I worked all week. I worked hard at my business. I have three different businesses. It is no easy matter for a man to go out and do that, and on Sunday he would like to sit down. I couldn't leave the child — be lugged to Duffy's Tavern, which is a Sunday occurrence. I took him with me wherever I went.

I took him mostly so that that child—the child will tell it to you if you ask him.

Q. Where did you take him?

A. I took him to hockey games, restaurants; I took him to the circus; I took him to the rodeo; I took him to the funny movies, which he enjoyed very much, Charlie Chaplin and things of that nature. He seemed to enjoy it very much.

I brought him home one day—the weather got very bad, I recall—this was in the winter, and it started to rain and snow. At four o'clock, I returned with him. He loved hot dogs. He asked me to buy him a hot dog. You know, children like them. I bought him this hot dog and a bottle of pop at four o'clock in the afternoon. Then I stayed in the house listening to the radio.

Mr. Rosenberg: Is this in response to a question?

The Court: It is perfectly all right.

The Witness: It won't do any harm. You can ask me anything you care to afterwards.

The Court: Go ahead.

[fol. 56] The Witness: I brought him home at four o'clock on a Sunday afternoon, after he had that. At nine o'clock I witnessed him being put to bed. I would hear the lady take a trip to the kitchen, or somewhere, and the noise of bottles, like if they were in the process of being opened and poured.

So, at nine o'clock, when he was being put to bed, I said, "Where are you going with that child?"

She said, "I am putting him to bed."

I said, "You don't mean to tell me you are going to put that child to bed with a hot dog, to stay in bed until tomorrow morning at nine o'clock, about eighteen or twenty hours before he gets any additional food?"

She said, "Yes;" he is full.

I had to put the clothes on the child and take him out to Bickford's Restaurant, so he would not go to bed with an empty stomach.

I wasn't home at night as a rule, but it wasn't that I didn't want to be home, it was because I wasn't wanted. When I came home and interfered and made my presence known, immediately I was called all sorts of vile names for the reason that I was breaking up a drinking party, and this woman drinks continuously alone. I have thrown as much as fifty empty beer bottles out. I was so ashamed of it down at the Rockaway bungalow that I carried them four bungalows to put them in someone else's garbage, I was that ashamed of them.

The Court: Did you ever strike your wife?

The Witness: Never did, only in the course of a struggle during intoxication.

[fol. 57] The Court: Did you ever give her a black eye?

The Witness: I think she may have got a black eye as a result of the tugging and pulling.

The Court: All right.

Q. She said that you came home evenings at nine, ten or eleven o'clock?

A. Yes.

Q. Did you come home at that hour?

A. Sometimes. I came home at nine. I never came home as late as ten. I could have been there every night at seven.

Mr. Rosenberg: I move to strike out the last part of the answer as not responsive.

The Court: We have no jury here, Mr. Rosenberg.

The Witness: That's all right.

The Court: It is all for my benefit. We have no jury.

The Witness: Go ahead.

The Court: If you want to be meticulous in your objections, it is all right.

Q. Why did you come home late?

A. I came home late——

The Court: I think I understand.

The Witness: I went to eat in a restaurant.

Q. Did you stay out, walk around the streets?

A. No. I came home, and when I came in the house, the abuse started, I got called dirty sons of bitches and bastards, the worst man in the world.

The Court: Just answer the questions.

[fol. 58] The Witness: I hope you won't take offense at that.

Q. Did you go out?

A. Then——

The Court: Did you go out; yes or no?

The Witness: Then I would go out.

Q. What did you do?

A. I used to try and find a place to go. I don't drink.

The Court: You don't drink?

The Witness: I will say I drink two drinks in six months, if it is a special occasion. I am not against drinking.

The Court: What kind of drinks?

The Witness: I may take a highball on a special occasion.

The Court: All right.

The Witness: Now——

Q. Where did you go?

A. I used to have to go out, on cold winter nights, go in a cafeteria, buy the News to read it and then I would go out

and come back and stand in a corner in the bitter cold so as my life would be at least bearable.

Q. You sat in restaurants?

A. I sat in cafeterias for hours at a time in the cold winter when I couldn't go home.

Q. Did she ever, to your knowledge, go to Duffy's Tavern with the boy?

A. Took the boy, went to Duffy's Tavern every time that I didn't take him out, and the purpose of my taking him was to keep him from Duffy's Tavern, and also the company she kept, which seemed to me—I didn't know them well—to be of that type.

Q. How often did you take the boy out?

A. Every Sunday of my life, for years. Well, I won't [fol. 59] say for years. The child is only seven. It—I will say a year and a half, wherever I went, I took him. I had to forego any other appointments I might make.

Q. Where did you go with him? I mean, did you spend the entire day with him?

A. The entire day until evening, and then stayed with him until he went to bed.

Q. What time did you leave the house with him?

A. I would leave the house sometimes at noon. I had to get him his first meal in Bickford's Restaurant.

Q. Where was your wife in the meantime?

A. My wife in the meantime would be——

Mr. Rosenberg: Unless the witness is testifying as to his own knowledge where the wife is——

The Witness: I will tell you. I invited her to come with me and she declined.

The Court: All right.

The Witness: Is that sufficient?

Q. Did she ever go to church on Sunday?

A. She never went to church. She said it is a racket.

Q. Did you go to church?

A. I did go to church, and took the child, to a Catholic Church.

Q. Are you a Catholic?

A. Yes, I am a Catholic.

Q. What is your occupation?

A. I am in the trucking business. I have some real estate.

Q. As to the trucking business, what is the name of that trucking business?

A. Halvey Trucking.

Q. Where is it located?

A. 2 West 13th Street.

Q. What is the nature of that business?

A. It is a business—It is a special sort of business. We have carload shipments. We are more of an agent than a truckman. Out of town people ship to us and we represent them and distribute here.

[fol. 60] Q. How many trucks do you have?

A. We have at the present time sixteen trucks. We ordinarily operate twenty-five. Ours is not a war business.

Q. Do you have a substantial income from that business?

A. Yes, we have a very substantial income. It is a profitable business.

Q. Do you have real estate besides that?

A. In my own name I have some real estate that is unencumbered; that is, it has no mortgage.

Q. Where?

A. I own 232 to 38 West 19th Street, and I also own 260-262——

The Court: I don't believe you need to go into the financial picture.

The Witness: You are satisfied that I can maintain the child if it gets to that point?

The Court: That question is not involved here so far as I am concerned, unless it is brought up on cross-examination.

Q. When you lived——

The Court: I would like to know where the child has been since he has come here; what facilities he has for keeping the child; supporting the child, or otherwise.

Q. Tell us about the child.

A. The child and I are very much attached to one another, as far as I can see. The child reciprocates the love I have for him.

The Court: Where did you have him since he has been here?

The Witness: I have had him at my home.

The Court: Does he go to school?

The Witness: No. I haven't taken him to school, for the [fol. 61] reason that I had a telephone from Florida that "If we get him in Florida, you will never seen him again."

I have made arrangements—I went to St. Ann's Academy on 76th Street and Lexington Avenue, and I spoke to the person in charge there, the Brother in charge of that Academy, and he said to me that he would take the boy, but he can't take him in mid-term. He couldn't have been gotten out of that place. He said "We don't take in any starters in mid-term. If you will register him in June, I will start him in September for you."

Q. Is that a private academy?

A. It is a private academy. It has a Grade A rating.

Q. Were you willing to pay his tuition there?

A. I will pay his tuition and maintenance, or whatever is required.

Q. Did you pay the household expenses yourself?

A. I paid—you mean—at home——

Q. At home?

A. During this period?

Q. Yes.

A. Oh, sure.

Q. What did you give your wife?

A. You mean at the present time or in the past?

Q. When you lived together?

A. I gave her $35 a week, and I told her if she didn't stop drinking, I would have to take some of it off. She had nothing to do with the money but spend it.

Mr. Rosenberg: Your Honor has made a statement about my being meticulous. I am not seeking to be meticulous, but the question is merely a springboard each time for the witness to make a speech about many subjects.

The Court: I will say this much. In so far as support is concerned, he can well support the child. Apparently, [fol. 62] there has been some misunderstanding between husband and wife, as a result of which the child may have to suffer.

I am quite satisfied that the father could support him. I am satisfied that the mother might be, also, a good person to have custody. It is one of those cases where, apparently, the parties cannot get together. Probably no question would be involved if they both lived in the City or the State. The

father is entitled to visitation. I am going to see that he gets it, if I have any say in the matter.

Mr. Cohen: The visitation that they want to give is this: He can see him any time he wants to, in Florida.

The Court: That's probably not sufficient.

Mr. Cohen: I want to bring out the fact——

The Court: I think I understand it all. I think you can leave the rest to argument.

Mr. Cohen: Possibly your Honor would like to hear the child.

The Court: I am going to talk to the child. I am going to talk to him without the presence of anybody and with the consent of all the parties here. Are you satisfied that I speak to your child?

Mrs. Halvey: Yes.

Mr. Halvey: Yes.

Mr. Cohen: Then, I will have nothing further to offer.

The Court: I have a pretty fair idea of what this is all about.

Mr. Rosenberg: I should like to say this, however. If you speak to this child in the absence of all the parties, consideration must be given to the fact that these past two weeks the father has alone been in the presence of the child. [fol. 63] The child is of an impressionable age.

The Court: There is no question about that.

Mr. Cohen: What about the fact that the child was with the mother for an entire year?

The Witness: He was away a whole year. Are you finished with me?

The Court: I think you are through. Do you want to cross-examine him?

Mr. Rosenberg: I should like to.

The Court: Go ahead.

Cross-examination.

By Mr. Rosenberg:

Q. Mr. Halvey, as I understand it, you said that the trouble with your wife began two years after you were married?

A. I said, approximately.

Q. Is that correct?

A. I said, approximately. About, yes; about two years after. I will say yes to that.

Q. That was in 1939?
A. '39? This is '45, isn't it?
Q. You were married in 1937, sir, is that right?
A. I think so; yes.
Q. You say that trouble began approximately two years afterwards?
A. Yes.
Q. That was in 1939, wasn't it?
A. Yes; that was the beginning.
Q. As I understand it, you say that she was drunk?
A. Yes, I will say she was drunk.
Q. Continuously?
A. Continuously for two years.
Q. Please, just answer my questions.
A. Well, I will answer it.
Q. Just answer my questions, please.
A. All right.
[fol. 64] Q. She was drunk for approximately two years?
A. Yes.
Q. In fact, she bordered on being a dipsomaniac?
A. Her own family said so.
Mr. Rosenberg: I move to strike out the witness's statement.
The Witness: All right.
Mr. Cohen: Mr. Halvey, don't make any comment; just answer the question.
The Witness: All right; I will. Go ahead.
Q. You say that she was over that period of time continuously drunk?
A. Yes.
Q. This condition continued throughout the years?
A. Yes.
Q. She was drunk during the day?
A. Yes.
Q. She was drunk at night?
A. At night.
Q. She was obscene?
A. Obscene.
Q. Is that what you say?
A. Yes.
Q. Violently obscene?
A. Violently obscene.
Q. In a fighting mood?
A. In a fighting mood at all times.

Q. This condition started in 1939?

A. Yes; I would say about that time.

Q. You two continued to live together until 1944, is that so?

A. Yes.

Q. During the week when you went to work, you left that child?

A. Yes.

Q. With this woman?

A. Yes.

The Court: With what woman?

Mr. Rosenberg: With his wife.

A. Yes.

Q. And she was drunk; yes or no?

A. Yes.

Q. Were you attached to that child?

A. Very much.

[fol. 65] Q. When you left home, your wife would be violently drunk?

A. Not violently drunk—drunk. She was never sober, I said.

Q. And day after day you left this child with this drunken woman, you say?

A. Yes.

Q. This drunkenness, you say, started when the child was approximately a year old?

A. I will say it started when he was approximately two.

Q. It started, you say, the drunkenness, about two years after marriage, is that right?

A. Say two years afterwards.

Q. The child was born one year after marriage, wasn't he?

A. Yes.

Q. So the child was one year old when the drunkenness started?

A. That is, in a mild form.

Q. Didn't you just say—

A. I said it got unbearable.

Q. I haven't finished my question.

A. Go ahead, you ask it.

Q. Thank you, sir. Didn't you say a few moments ago—

Mr. Rosenberg: I withdraw the question.

Q. Didn't you say a few moments ago that this woman starting with two years after marriage, became a habitual drunkard?

Mr. Cohen: No. He said for two years continually she was drunk.

The Witness: She was drunk for the past two years prior to her departing.

The Court: I am not passing on the question of who is at fault.

Mr. Rosenberg: I will tell you what I am trying to prove. I am trying to prove this witness's testimony is wholly incredible.

The witness: Why?

[fol. 66] Mr. Cohen: Mr. Halvey, keep quiet.

Mr. Rosenberg: That he has here a boy that he says he is deeply attached to. If this woman—please, sir, don't interrupt. If this woman even vaguely approximated the condition that this man said she was in continuously, it isn't conceivable that a father that loved his son would daily walk out and leave a baby in the presence of a violently drunk, obscene woman.

The Court: Let's go on.

Q. You say you struck your wife on occasions?

A. I didn't say it.

Q. Did not you testify that she received a black eye at your hands?

A. I said during a struggle, she was in the fighting mood by the time night came—she started in the morning—during her sleeping hours she wasn't drunk, I don't think, she was recovering.

Q. And you lived with this woman, you say, for about five years during which time she was continually——

The Court: All of that is argumentative.

The Witness: I didn't say that.

The Court: I am not interested in these habits any more. I think you have gone far enough. I am interested in the welfare of the boy. I would like to know the extent of my jurisdiction and what can be done under the circumstances, considering all of these facts.

Mr. Rosenberg: May I——

The Court: I have my own ideas as to what the fights were. Enough has been brought out for me to form a conclusion.

[fol. 67] Mr. Rosenberg: May I put Mrs. Halvey back on the stand with respect to some of the statements made by Mr. Halvey?

The Court: I take it, if she takes the stand, she is going to testify that everything he said is not so; she is going to reiterate her testimony on direct. She is not going to add anything in rebuttal.

Mr. Rosenberg: And will make specific denials.

The Court: I assume she will do that.

Mr. Rosenberg: Of the various alleged statements of fact that were testified to by Mr. Halvey.

The Court: I will take it that if she takes the stand she is going to make plain her position on your direct case, and if he were to take the stand he would maintain his position, unless you want to put other witnesses on the stand—it is up to you people. In so far as the parties themselves are concerned, probably I have enough testimony on the facts of the case.

If you have other witnesses, we will adjourn the matter until ten o'clock tomorrow morning and we will go on.

Mr. Cohen: I have no further witnesses.

The Court: What about you?

Mr. Rosenberg: No. I think I will stop here.

The Court: Then, I will talk to the boy.

I will reserve decision, and I will take a memorandum. Exchange them by Wednesday. If you have any reply memos, I should like to have them on Friday. If you find you can't have them on the specified dates, call up [fol. 68] my secretary and ask for more time, and he will be very lenient, so far as that is concerned.

On the consent of the parties, and on the order of the Court, the mother will be permitted to have the custody of the boy pending the decision of the Court between the hours of two and four o'clock in the afternoons. You may call for the child at the home of the father—where is it?

Mr. Halvey: If it is agreeable to you, at my office, 2 West 13th Street. You may call for the child at that address.

The Court: You may take the child anywhere with you between two and four and bring the child back at five o'clock.

If you want to go to a movie, go to a movie with him.

On Sundays, the boy will be at the home of the defendant at 303 West 19th Street, Apartment 43. You will call for the child there at two o'clock and return him at five.

Both parties are here, and I want both of you to listen carefully to what I have to say. If there is a violation of the Order of the Court, I shall take drastic action against the party that violates the order.

[fol. 69] RELATOR'S EXHIBIT 1

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

Chancery No. 90191-F

ROSE HALVEY, Plaintiff,

vs.

JOHN F. HALVEY, Defendant

FINAL DECREE OF DIVORCE

This cause coming on this day to be heard upon the bill of complaint of the plaintiff, a decree *pro confesso* having been duly and regularly entered against the defendant, the report of the Special Master upon the testimony of the plaintiff and witnesses in said cause, and it appearing unto the Court that the equities of the cause are with the plaintiff and that she is entitled to the relief as prayed for her in her bill of complaint, and the Court being otherwise fully advised in the premises,

It is ordered adjudged and decreed that the report of the Special Master be and the same hereby is ratified and confirmed in all respects.

It is further ordered adjudged and decreed that the bonds of matrimony now and hitherto existing between the plaintiff and defendant be and the same are hereby forever dissolved, and the plaintiff, Rose Halvey, and the defendant, [fol. 70] John F. Halvey, be and they are hereby divorced each from the other, *a vinculo matrimonii*, and they are hereby restored to all of the rights and privileges of single persons.

It is further ordered adjudged and decreed that the permanent care, custody and control of the minor child of

the marriage, to-wit, John A. Halvey, be and the same is hereby awarded to the plaintiff, Rose Halvey.

Done and ordered at Miami, Dade County, Florida this 20th day of April, A. D. 1945.

Marshan C. Wiseheart, Circuit Judge.

[fol. 71] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, E. B. LEATHERMAN, Clerk of the Circuit Court in and for Dade County, Florida, do hereby certify that the foregoing is a true and correct photostat copy of the Final Decree of Divorce filed April 20, 1945 and recorded on April 21, 1945 in Chancery Order Book 723, at Page 508, in the case of Rose Halvey, Plaintiff, against John F. Halvey, Defendant, in Chancery Case No. 90191, according to the files and records of this office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on this the 24th day of April, A. D. 1945.

E. B. Leatherman, Clerk Circuit Court, Dade County, Florida. (Seal.)

[fol. 72] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, Ross WILLIAMS, Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade, do hereby certify that said Court is a court of record, and having a Clerk and a Seal; that E. B. Leatherman, who signed the foregoing attestation, is the duly elected and qualified Clerk of the said Circuit Court of the County of Dade and State of Florida, and was at the time of signing said attestation; that his said signature thereto is genuine, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is sufficient and in due form of law.

Witness my hand and official signature, this the 24 day of April, A. D. 1945.

Ross Williams, Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade. (Seal.)

[fol. 73] RELATOR'S EXHIBIT 1

STATE OF FLORIDA,
County of Dade ss:

I, E. B. LEATHERMAN, Clerk of the Circuit Court of the County of Dade and State of Florida, do hereby certify that the Honorable Ross Williams, whose name is subscribed to the preceding certificate, is Judge of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for the County of Dade, and that the signature of said Judge to the foregoing certificate is genuine, and that said certificate is sufficient and in due form of law.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 24 day of April A. D., 1945.

E. B. Leatherman, Clerk Circuit Court, Dade County, Florida.

[fol. 74] RESPONDENT'S EXHIBIT A

John

When you get this I & Johnnie will be well well on our way to Florida—left this morning.

I left this way because I was afraid of my life & Johnnie's life too.

Now you will have plenty of time to sit & think of the inhuman treatment you gave the both of us.

That stuff of about me drinking is nothing but a cover for your brutal & sadistic character. You know that as well as I do—if you didn't have those "kinks" you would of never subjected me & Johnnie to what you did——

I did this myself—I bought tickets & all with my money—no one knows why I left—I'll leave the smearing to you.

As for the Farrells as long as I've known them they have told you were crazy.

Lou is the last person I'd see Johnnie with—that is why I had a fight with her at Xmas. I resented the treatment Johnnie got—he will be no foot-ball for her brat.

I never made any trouble for you at any time—I want none from you—remember that—Johnnie is my son—I intend to keep him. May God forgive you and any one else. You will all be paid with the coin you spent.

My address will be 3950 Crystal View Ct. Miami. c/o Hagerty.

Rose

I had to get away
will be back.

[fol. 75] IN THE SUPREME COURT OF NEW YORK

OPINION

By MR. JUSTICE BENVENGA

Matter of Halvey (*Halvey*)—This proceeding involves the custody of a seven year old boy. His parents were married in 1937, and he was born in 1938. In April, 1944, while his parents resided in the City of New York, the petitioner left her husband and, without his knowledge and consent, took the boy with her. Since then petitioner and her son have lived in Florida. In February, 1945, petitioner filed a suit for divorce in Florida, obtaining an order directing the service of process by publication. Defendant never appeared in that action. In April, 1945, a default decree was entered granting a divorce to the petitioner and awarding to her the custody of the boy. Just before the signing of the decree, defendant, without the knowledge and consent of petitioner, brought the child back to the City of New York. The question presented is whether the defendant is entitled to visitation and access to the child; and, if so, whether this court has jurisdiction and authority to grant and enforce that right.

It is well settled that a judgment of a foreign court, having jurisdiction of the action and of the parties, awarding custody of an infant to one of the parties, has the same force and effect in another jurisdiction that it has in the jurisdiction where it was rendered. It is binding

on the parties as a conclusive determination of the right to custody under the conditions existing at the time of its rendition, and a change of custody will not be decreed unless circumstances arise which make it necessary for the best interests of the child (Ansorge *v.* Armour, 267 N. Y., 492, 498-499; People ex rel. Herzog *v.* Morgan, 287 N. Y., 317, 320; People ex rel. Tull *v.* Tull, 245 App. Div., 508, 510, aff'd 270 N. Y., 619; Matter of Bull, 266 App. [fol. 76] Div., 290, 291-292, aff'd 291 N. Y., 792; Matter of Jiranek, 267 App. Div., 607, 610).

Did the Florida court have jurisdiction of the action and of the parties? This, of couse, depends upon whether the petitioner and her son were domiciled in Florida. It is not disputed that when the action was started petitioner and her son were residents of Florida. Since no evidence was adduced to show that the petitioner was not a bona fide resident, the Florida decree, in so far as its divorce provisions are concerned, is entitled to full faith and credit (Master of Holmes, 291 N. Y., 261, 273; Matter of Bingham, 265 App. Div. 463, 466). But there is doubt as to whether, under the circumstances of this case, the child was domiciled in Florida and whether the custody provisions of the decree are entitled to full faith and credit. No case authority on that point has been called to my attention and none has been found. It has been asserted that where a married woman is the joint guardian of the children with her husband as in New York (Dom. Rel. Law, sec. 81) the domicile of the children is that of the mother whenever she establishes a domicile apart from her husband and the children actually live with her. (Goodrich, Conflict of Laws, 2d Ed., p. 32; Restatement, Conflict of Laws, sec. 32; id., N. Y., Annot., sec. 32; 1 Beale, Conflict of Laws, sec. 32.2; Matter of Thorne, 240 N. Y., 444, 449; Finlay *v.* Finlay, 240 N. Y., 429, 431; but see People ex rel. Brooks v. Brooks, 35 Barb., 85, 86, 91-95). In view of the growing liberality with respect to acquisition of a separate domicile by married women and the equally growing liberality in permitting the mother to control the domicile of her children [fol. 77] (see Stumberg, Conflict of Laws, p. 43, note 95), it will be assumed that the custody provisions of the decree are entitled to full faith and credit. But even if it be assumed that they are not, the best interests of the child would seem to require that the petitioner should have his custody, for a child of tender years is entitled to such

care, love and discipline as only a good and devoted mother can usually give (Ullman *v.* Ullman, 151 App. Div., 419, 424-425).

But the question still remains whether the defendant is entitled to the right of visitation. True, the Florida decree does not provide for visitation. That is no obstacle. The decree in no way diminishes the prerogative of this court, as parens patriæ, to do what it considers best for the welfare of the child (People ex rel. Herzog *v.* Morgan, supra; Matter of Bull, supra).

Though the decree awards custody to the petitioner, defendant possesses certain natural rights with respect to his child. One of these is the right of visitation and access. This right cannot be withheld, unless the defendant has forfeited the privilege by his conduct, or unless the exercise of the privilege would injuriously affect the welfare of the child, or unless the decree specifically provides otherwise, and there has been no change of circumstances (Jacquet v. Di Simone, 175 La., 617, 143 So., 710, 711; Eaton *v.* Eaton, 237 S. W. 896, 900 [Mo.]; Hays *v.* Hays, 123 S. W., 2d, 968, 969 [Tex.]; 2 Beale, Conflict of Laws, §148.1; 27 C. J. S., Divorce § 312, see Nash *v.* Nash, 236 App. Div., 89, 91). "Such right is not destroyed by the divorce, since there is in the decree no express provision to that effect, and nothing in the facts to justify it if there had been" (Eaton *v.* Eaton, supra, p. 900).

[fol. 78] That the defendant is entitled to visitation seems clear. If the petitioner, who until she left her husband was a resident of this state, intended to continue her residence here, no problem would be presented. The usual order could be entered. But petitioner has become a resident of Florida and, apparently, intends to make that state her home, while the defendant's place of business is in this state, and he must continue his residence here. Even that would present no difficulty, if the petitioner intended in good faith to abide by the order of this court. But, unfortunately, as frequently happens in cases of this nature, there is little or no assurance that petitioner will comply with the provisions of any order granting the right of visitation. Indeed, I am satisfied that, unless proper safeguards are provided, the entry of an order which merely grants the right of visitation would be a futile gesture.

Under the circumstances, the petitioner will not be permitted to remove the child from this state, unless she gives

a bond or other undertaking conditioned for the faithful performance of the terms and conditions of the order and for the return of the child to this state whenever so required. That the court has power to make such an order is clear (Campbell *v.* Lovgren, 175 Miss., 4, 166 So., 365; Gibson *v.* Gibson, 156 Ark., 30, 245 S. W., 32, 33; Mattox *v.* Mattox, 129 Okla., 301, 264 Pac. 898, 900; 2 Beale, Conflict of Laws, sec. 148.1; 27 C. J. S. 1180; see Domestic Relations Law, sec. 70; People ex rel. Paulding v. Paulding, 15 How. Pr., 167).

As to the provisions of the order respecting visitation and the terms and conditions of the bond, counsel should consult the court.

[fol. 79] In the Supreme Court of New York

Stipulation Settling Case—Sept. 29, 1945

It is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated: New York, September 29th, 1945.

Mitchell, Capron, Marsh, Angulo & Cooney,
Attorneys for Relator-Appellant.

Isidore Cohen,
Attorney for Defendant-Respondent.

In the Supreme Court of New York

Order Settling Case—Oct. 9, 1945

On the foregoing stipulation, the above case on appeal, which contains all the evidence and exceptions of all parties, is hereby settled and ordered on file.

Dated: New York, October 9, 1945.

Felix C. Benvenga, *Justice.*

[fol. 80] IN THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—SEPT. 29, 1945

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing are true copies of the notice of appeal, of the order appealed from and of the papers on which it was entered, the case and exceptions as settled, the opinion of the Court and the whole thereof, now on file in the office of the Clerk of the County of New York, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated: New York, September 29, 1945.

MITCHELL, CAPRON, MARSH, ANGULO & COONEY,
Attorneys for Relator-Appellant.

ISIDORE COHEN,
Attorney for Defendant-Respondent.

IN THE SUPREME COURT OF NEW YORK

ORDER FILING RECORD IN APPELLATE DIVISION—OCT. 9, 1945

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department.

Dated: New York, October 9, 1945.

FELIX C. BENVENGA, *Justice.*

[fol. 81] COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

SUPPLEMENTAL STATEMENT UNDER RULE 234

After the filing of the notice of appeal to the Appellate Division, an order was obtained at a Special Term of the Supreme Court, New York County, correcting and amending the title of the proceedings *nunc pro tunc* as of May 1st, 1945. A copy of said order is included in this record.

There has been no change of parties or attorneys since the appeal was argued in the Appellate Division.

[fol. 82] SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

PLEASE TAKE NOTICE that the relator, Rose Halvey, hereby appeals to the Court of Appeals from the order dated December 14 1945 entered upon the decision of the Appellate Division of the Supreme Court for the First Department, in the office of the Clerk of the said Appellate Division on or about the 14th day of December 1945, certified copy of which was filed in the office of the Clerk of the County of New York, on or about the 20th day of December, 1945, affirming the final order of the Special Term of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York, on the 19th day of June, 1945, and the said relator appeals from each and every part of said order and from the whole thereof.

This appeal is taken as of right on the ground that there is directly involved the construction of the Constitution [fol. 83] of the United States and on the further ground that one of the Justices of the Appellate Division dissented from its decision.

Dated: New York, N. Y., January 8th, 1946.

Yours, etc.,

MITCHELL, CAPRON; MARSH, ANGULO & COONEY,
Attorneys for Rose Halvey, Relator-Appellant,
20 Exchange Place, New York 5, New York.

To:

ISIDORE COHEN, Esq.,
Attorney for John F. Halvey,
Defendant-Respondent,
150 Broadway,
New York, N. Y.

Clerk of the County of New York.

[fol.] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 14th day of December, 1945.

Present:

HON. FRANCIS MARTIN,
Presiding Justice
" ALFRED H. TOWNLEY,
" ALBERT COHN,
" JOSEPH M. CALLAHAN,
" ISIDORE WASSERVOGEL,
Justices

15921

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, ROSE HALVEY, *Relator-Appellant*,
for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by JOHN F. HALVEY, *Respondent*

ORDER OF AFFIRMANCE BY APPELLATE DIVISION—DEC. 14, 1945

An appeal having been taken to this Court by the relator from an order of the Supreme Court, New York County, entered on the 19th day of June, 1945, except in so far as said order adjudged and decreed that the custody of the infant child John Arthur Halvey remain with the mother, and said appeal having been argued by Mr. James D. [fol. 85] Ouchterloney of counsel for the appellant, and by Mr. Jacob Shientag of counsel for the respondent; and due deliberation having been had thereon,

IT IS HEREBY ORDERED that the order so appealed from be and the same is hereby affirmed without costs. One of the Justices dissents and votes to reverse the order so far as appealed from.

Enter

F.M.

IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION OF APPELLATE DIVISION

BY MARTIN, *P. J.*; TOWNLEY, COHN, CALLAHAN and WASSERVOGEL; *JJ.*

People ex rel. Halvey, rel.-ap. *v.* Halvey, res.—Though we do not adopt in their entirety the views expressed by

the Special Term, we think the result arrived at was correct. Order, so far as appealed from, affirmed, without costs. (MARTIN, *P. J.*, dissents and votes to reverse the [fol. 86] ordered so far as appealed from.) Order filed.

At a Special Term, Part II, of this Court, held in and for the County of New York, at the County Court House, at Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 24 day of October, 1945.

Present:

HONORABLE FELIX C. BENVEGA, *Justice*.

IN THE MATTER of the Application of ROSE HALVEY, *Relator*, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by JOHN F. HALVEY, *Defendant*.

ORDER OF SPECIAL TERM CORRECTING TITLE OF PROCEEDINGS—OCT. 24, 1945

Upon the stipulation hereto annexed, dated October 23, 1945, and upon all proceedings hereinbefore had, it is

ORDERED, that the title herein be corrected and amended to read as follows:

"People of the State of New York, ex rel, Rose Halvey, Relator.

for a Writ of Habeas Corpus to obtain the custody of JOHN ARTHUR HALVEY, now held by JOHN F. HALVEY, *Respondent.*"

nunc pro tunc as of May 1st, 1945, without prejudice to any proceedings hereinbefore had.

Enter,

F. C. B.
J.S.C.

[fol. 87] IN THE SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing printed record upon appeal constitutes the true and correct copies of the papers on appeal to the Supreme Court, Appellate Division, First Department, from the order of the Special

Term of the Supreme Court, New York County, dated June 18th, 1945, the notice of appeal to the Court of Appeals, the order dated December 14, 1945, made by the Appellate Division, First Department, in reference to the appeal herein, the opinion of the Appellate Division and all papers upon which the Appellate Division, First Department, acted in making the said order of affirmance from which this appeal is taken and the whole thereof, now on file in the Office of the Clerk of New York County and in the office of the Clerk of the Appellate Division, First Department and certification thereof by the Clerk of the County of New York is hereby waived.

Dated: New York, N. Y., January 30th, 1946.

Mitchell, Capron, Marsh, Angulo, & Cooney,
Attorneys for Rose Halvey, Relator-Appellant.
Isidore Cohen
Attorney for John F. Halvey, Defendant-Respondent.

[fol. 88] Service of three copies of the within record on Appeal is hereby admitted this 30 day of January, 1946.

Isidore Cohen,
Atty for defendant-respondent.

[fol. 89] In the Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Apeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of April in the year of our Lord one thousand nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

[fol. 90] Remittitur April 13, 1946. People &c ex rel Rose Halvey, Appellant, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Respondent.

Be it remembered, That on the 1st day of February in the year of our Lord one thousand nine hundred and forty-six, Rose Halvey, the appellant—in this cause, came hereunto the Court of Appeals, by Mitchell, Capron, Marsh,

Angulo & Cooney, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Apellate Division of the Supreme Court in and for the First Judicial Department. And John F. Halvey, the respondent—in said cause, afterwards appeared in said Court of Appeals by Isidore Cohen, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 91] Whereupon, The said Court of Appeals having heard this cause argued by Mr. James D. Ouchterloney of counsel for the appellant—, and by Mr. Isidore Cohen of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 92] Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 13, 1946.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

[fol. 93] At a Special Term, Part II of the Supreme Court, New York County, held at the County Courthouse, Centre and Pearl Streets, Borough of Manhattan, City and State of New York, on the 9th day of May, 1946.

Present: Hon: Hon. Aron Steuer, Justice.

People of the State of New York ex rel, Rose Halvey, Relator, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Respondent.

ORDER ON REMITTITUR—May 9, 1946

The above named relator having appealed to the Court of Appeals of the State of New York from the order of affirmance by the Appellate Division of the Supreme Court, First Department, dated December 14, 1945, which affirmed the order of this court entered on the 19th day of June, 1945, and from each and every part of said order of affirmance and from the whole thereof, and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order so appealed from, as aforesaid, be affirmed without costs, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

[fol. 94] Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Isidore Cohen, attorney for the Respondent herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

ENTER

J. S. C.

Filed, May 10, 1946, New York County Clerk's office.

[fol. 95] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 96] IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

People of the State of New York, ex rel, Rose Halvey, Relator-Petitioner, for a Writ of Habeas Corpus to obtain the custody of John Arthur Halvey, now held by John F. Halvey, Defendant-Respondent

ORDER EXTENDING THE TIME WITHIN WHICH TO FILE AN APPLICATION FOR A WRIT OF CERTIORARI

Upon consideration of the petition of Rose Halvey, pursuant to 28 U. S. C. A., Section 350, and the Court not being in session, it is

Ordered that the time within which the petitioner may make application for a writ of certiorari be and the same hereby is enlarged and extended until August 11th, 1946.

July 8th, 1946.

Stanley Reed, Justice of the Supreme Court.

[fol. 97] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 384

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL.,
ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

ROBERT S. FLORENCE,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari:	
A. Statement of the Matters Involved	2
B. Jurisdiction	4
C. Constitutional Provision Involved	5
D. Question Presented	5
E. Reasons Relied on for the Allowance of the Writ	5
Brief in Support of Petition:	
I. Preliminary Statement	7
II. Summary of Argument	7
III. Argument	8
Point 1	7
Point 2	8
Conclusion	12

Table of Cases Cited

Ansorge v. *Armour*, 267 N. Y. 492	9
Davis v. *Davis*, 305 U. S. 32, 83 L. Ed. 26	5, 7
Finlay v. *Finlay*, 240 N. Y. 492	11
Herzog v. *Morgan*, 287 N. Y. 317	11
Pickle v. *Pickle*, 215 App. Div. 38, 45	11, 12
William v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279; 325 U. S. 226, 89 L. Ed. 1577	5, 7
Young v. *Roe*, 290 N. Y. 283	11

Statutes Cited

Sec. 237 (b) Judicial Code, 28 U. S. C. Sec. 344 (b)	4
Sec. 1, Art. 4, Constitution of United States of America	11
A. L. I. Restatement of the Law, Conflict of Laws, Sec. 147	9
2 Beale Conflict of Laws, Sec. 147.1	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL., ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Rose Halvey respectfully petitions for a Writ of Certiorari to the Court of Appeals of the State of New York to review an order of affirmance entered on May 10, 1946 (R. 67) affirming an order of affirmance by the Appellate Division of the Supreme Court in and for the First Judicial Department in the County of New York on the 14th day of December, 1945 (R. 62), which order of affirmance affirmed an order of the Supreme Court, New

York County, entered on the 19th day of June, 1945 (R. 3) based upon a written opinion filed in the cause and reported in 185 N. Y. Misc. Rep. 52.

Statement of the Matters Involved

Petitioner Rose Halvey, a resident of Miami, Florida since April 13, 1944, married John F. Halvey, Respondent, a resident of New York City, on April 10, 1937, in New York; they resided in New York City. A son, John Arthur Halvey, was born to the parties on February 4, 1938. The child and his parents resided in New York City until April 12, 1944, when petitioner left her husband, taking her son with her to Miami, Florida. About one year after establishing legal residence for herself and son in Florida, petitioner obtained a final decree of divorce from the respondent in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, on April 20, 1945. Service upon respondent in the divorce action was by publication. He did not appear or contest the cause. The decree awarded the care, custody and control of the child to petitioner (R. 53).

On April 19, 1945, one day prior to the entry of the decree, while the child was attending school, the respondent, without the knowledge, consent or permission of petitioner, took possession of the child in Miami, Florida, and returned with him to New York City; subsequently refusing to return the child to petitioner, who promptly came to New York City, and on May 1, 1945, instituted *habeas corpus* proceedings in the Supreme Court of New York County to compel return of the child to her (R. 5). Written response to the writ was made, alleging that the separation of the petitioner from the respondent was without cause or justification, and that petitioner was not a fit person to have custody of the child (R. 9).

The only witnesses examined before Mr. Justice Benvenga in the New York Special Term of the Supreme Court of New York County were the mother and father of the child, and the testimony adduced consisted chiefly of charges and countercharges, which each in turn denied. The child was privately interviewed by the Presiding Justice. The final decree of divorce exemplified in the matter prescribed by Congress (R. S. 905, 28 U. S. C., Sec. 687), was introduced in evidence (R. 53).

In a written opinion the Presiding Justice stated:

> "* * * It is not disputed that when the action was started petitioner and her son were residents of Florida. Since no evidence was adduced to show that the petitioner was not a bona fide resident, the Florida decree, in so far as its divorce provisions are concerned, is entitled to full faith and credit. * * * In view of the growing liberality with respect to acquisition of a separate domicile by married women and the equally growing liberality in permitting the mother to control the domicile of her children (see Stumberg, Conflict of Laws, p. 43, note 95), it will be assumed that the custody provisions of the decree are entitled to full faith and credit. But even if it be assumed that they are not, the better interests of the child would seem to require that the petitioner should have his custody, for a child of tender years is entitled to such care, love and discipline as only a good and devoted mother can usually give (Ullman v. Ullman, 151 App. Div., 419, 424-425)."

The opinion then discusses the right of visitation of the respondent, reciting that the petitioner apparently intends to make Florida her home, while the respondent's business being in New York and there being no assurance that petitioner would comply with the order granting the respondent the right of visitation, held that the petitioner would not be permitted to remove the child without posting a

bond for the faithful performance of the order for return of the child. Thereafter, on June 18, 1945, the order appealed from was entered (R. 3). It ordered and decreed as follows:

(1) That the custody of the infant child (John Arthur Halvey) remain with the mother, Rose Halvey; and

(2) That the father, John F. Halvey, have certain rights of visitation, as follows:

(a) During each summer vacation period after the year 1945, the child shall be with the father commencing on June 23 and ending on September 7 of each year, and shall live with him during such period in his home in New York;

(b) During the entire Christmas vacation period the child will be with the father and live with him in his home in New York; and

(c) At any time, while the child lives with the mother, the father shall have the right to visit and have the child with him each afternoon from 2 o'clock until 5 o'clock.

The order then required the petitioner to file a surety bond in the sum of $5000.00 in form to be approved by the Court, conditioned for her faithful performance of the terms and conditions of this order and for the delivery of the child at her home in Florida to the father for removal to New York whenever, under the terms of the order, the father should have the right to have said child with him.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b). The order of the Court of Appeals of the State

of New York was entered on May 10, 1946. The time within which the petitioner may make application for a Writ of Certiorari was enlarged and extended until August 11, 1946 by order of Mr. Justice Stanley Reed entered July 8, 1946, the Court not being in session.

Constitutional Provision Involved

The constitutional provision involved is Article 4, Section 1, of the Constitution of the United States of America, giving Full Faith and Credit in each State to the public Acts, Records, and Judicial Proceedings of every other State.

Question Presented

Whether a decree of the Circuit Court of Dade County, Florida, which awarded sole custody of the child to the petitioner is given the full faith and credit to which it is entitled under the Federal Constitution, when, there being no change in circumstances since the entry of the Florida decree, a New York decree changes and alters a Florida decree by directing that the child "shall live" with the respondent for substantial periods in each year, and requires the posting of a surety bond to require petitioner to comply with the New York decree.

Reasons Relied On for the Allowance of the Writ

1. The decision appealed from is in conflict with the decision of this Court in *Davis* v. *Davis*, 305 U. S. 32; 83 L. Ed. 26, wherein at page 40 this Court stated:

> "Thus the Congress rightly interpreted the clause to mean not some but full credit."

And further conflicts with the decisions of this Court in *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279; 325 U. S. 226, 89 L. Ed. 1577.

2. The action in this cause was arbitrary and capricious and should be reviewed by this Court.

3. The order appealed from is repugnant to the constitutional guaranty of full faith and credit when it appears that the custody of the child was changed simply because a New York Court disagreed with the decision of a Florida Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the Court of Appeals of the State of New York, to the end that this cause may be reviewed and determined by this Court; that the order of the said Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

ROBERT S. FLORENCE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 384

PEOPLE OF THE STATE OF NEW YORK, EX REL., ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, CUSTODIAN OF JOHN ARTHUR HALVEY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

Statement of the matter involved, jurisdiction and the question presented appear in the Petition for a Writ of Certiorari herein and, in the interest of brevity, are incorporated here by reference.

II

Summary of Argument

Point 1. The decision challenges the ruling of this Court in *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26; *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279; 325 U. S.

226, 89 L. Ed. 1577; and extends some, but not full, credit to the Florida decree.

Point 2. The decision is arbitrary and capricious and in violation of the decisions of this Court, and without consideration of the fundamental requirements the New York Court destroyed the custody provisions of the Florida decree simply because the New York Court disagreed partly with the Florida decree.

Argument

The decree of the Florida Court awarding custody of the child to the mother is entitled to full faith and credit, and the alteration of the custody provisions of the decree was in direct conflict with *Davis* v. *Davis*, *supra*, when the Court admitted the Florida decree was entitled to full faith and credit, had not been impeached and without more gave some, but not full, credit to the Florida decree.

This Court held in *Williams* v. *North Carolina*, *supra*, that full faith and credit must be given by the North Carolina Courts to a decree of divorce granted by a Nevada Court where a bona fide domicile had been established in Nevada. This Court held that it is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause of the Constitution of the United States.

In the last appearance of the *Williams* case (325 U. S. 226), this Court said:

> "The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage contract wheresoever contracted."

Also, in the same case:

> "In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional fact

upon which it is founded, and domicil is a jurisdictional fact (p. 232)."

The New York decree recognizes and admits domicil and jurisdiction of the Florida Court.

Again, in the *Williams* case, *supra:*

> "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment (p. 233)."

There was no attempt made to impeach the jurisdiction of the Florida decree either as to subject matter or person.

It is likewise true that an award of custody, like any other decree of a competent court, is entitled to recognition and enforcement in other States (A. L. I. Restatement of the Law, Conflict of Laws, Section 147; 2 Beale Conflict of Laws, Section 147.1).

This precise question was discussed in *Ansorge* v. *Armour*, 267 N. Y. 492, in which it is held that in the absence of fraud, a Judge of the State of New York could not change the custody of the child merely because he did not agree with the action of the Nevada Court.

In the present case the Presiding Justice in his opinion also expressed this principle when he held:

> "The best interests of the child would seem to require that the petitioner should have his custody."

And very properly held that the Florida decree was entitled to full faith and credit as to the custody provisions

therein contained, but immediately thereafter he completely destroyed the custody provisions of the Florida decree by changing the terms thereof, requiring the mother, the petitioner, to post a bond to comply with the terms of the changed decree. Such a mandate could not possibly be reconciled with the provisions of the Florida decree. The Florida Court has adjudicated that the mother have the "permanent care, custody and control" of the child. The New York Court has adjudicated that she can have the custody and control for only nine months in each year in any event. The fact that the Special Term opinion, decree and order granted the father custody for only three months in each year, does not legalize the award. If the nullification of the Florida decree is valid for the three months period, it would have been equally valid had the New York order directed that the child live with the father six months or even eleven months in each year. Any alteration of the custodial period as fixed by the Florida decree must necessarily encroach upon the prerogatives of the Florida Court, and is a denial of full faith and credit to its decree.

It is admitted that there was no change of circumstances since the entry of the Florida decree to bring into this cause the *parens patriæ* doctrine. This was admitted when it held that the mother was a proper person to have the custody of the child and awarded her such custody.

The only question, as appears from the opinion of the Presiding Justice of the Special Term, was whether or not the father "is entitled to the right of visitation." The provisions of the order do not confer a "mere right of visitation" but constitute a new grant of custody. The court itself recognized the distinction and in its order granted the father a specific right of visitation in addition to that new grant of custody.

Finally full faith and credit of the Florida decree were further denied when the petitioner was required to post a bond before she could enjoy the rights granted to her under the decree of the New York Court.

At no time has it been claimed that there has been any change of circumstances since the entry of the Florida decree, nor is there anything in the record which would support such a contention. It is not disputed that at the time of the entry of its decree, the Florida Court had control of the custody of the child, and its decree may not be modified until some facts appear to show that circumstances and conditions have so changed that it is necessary to alter the provisions of the decree for the welfare of the child (*Young* v. *Roe*, 290 N. Y. 283; *Herzog* v. *Morgan*, 287 N. Y. 317; *Finlay* v. *Finlay*, 240 N. Y. 492).

There having been no change of circumstances, a modification of the Florida decree herein complained of constitutes a denial of full faith and credit to its provisions for custody of the child, and is in violation of Article IV, section 1 of the Federal Constitution.

If the respondent wished to obtain a modification of the Florida decree, he could have at any time, and can now present a suitable application to that Court, which still retains jurisdiction of the subject matter. The willful and unlawful removal of the child from the jurisdiction of the Florida Court cannot be advanced as a change in circumstances which would warrant any modification of the Florida decree by the Courts of New York or of any other State. The respondent has gained no right by his act of removing the child from Florida for the purpose of defeating the decree duly entered in that jurisdiction. The possession of the child which he then obtained is not a custody which the Court should respect (*Pickle* v. *Pickle*,

215 App. Div. 38, 45), and such action should not have been condoned by the various Courts of the State of New York.

Conclusion

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT S. FLORENCE,
Counsel for Petitioner.

(5871)

Supreme Court of the United States

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSE HALVEY,

Petitioner,

vs.

JOHN F. HALVEY, Custodian of JOHN ARTHUR HALVEY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Subject Index

PAGE

BRIEF IN OPPOSITION TO PETITION:

1. Summary of Argument 1
2. Argument 2
   - Point I 1
   - Point II 1
   - Point III 1
   - Conclusion 6

Table of Cases Cited

Ansorge v. Armour, 267 N. Y. 492 3

In re Bull, 266 App. Div. 290, 291 N. Y. 792 ..... 3, 4

Davis v. Davis, 305 U. S. 32 5

Finlay v. Finlay, 240 N. Y. 429 2

Hansberry v. Lee, 311 U. S. 32 2

Matter of DeSaulles, 101 Misc. 447 2

Matter of Stewart, 77 Misc. 524 2

People ex rel. Allen v. Allen, 105 N. Y. 628 3

People ex rel. Herzog v. Morgan, 287 N. Y. 317 ..... 3, 4, 6

People ex rel. Pickle v. Pickle, 215 App. Div. 38 ..... 2, 5

Seeley v. Seeley, 30 App. D. C. 191, 209 U. S. 544 5

State ex rel. Rasco v. Rasco, 139 Fla. 349 5

Williams v. North Carolina, 317 U. S. 287, 325 U. S. 226 5

Yarborough v. Yarborough, 290 U. S. 202 4

Young v. Roe, 290 N. Y. 823 3

Supreme Court of the United States

OCTOBER TERM, 1946

No. 384

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of Argument

POINT I.—The infant was not a party to the Florida proceedings; is not bound thereby, and the New York Courts could make such provision for his welfare as it deemed necessary.

POINT II.—Despite the Florida decree, the question of custody could be examined anew by the Courts of New York State, when the child came within the borders of the latter state.

POINT III.—The New York Courts did not deny full faith and credit to the Florida decree when they extended to the father the right of visitation and of access to his child.

Argument

The full faith and credit clause of the Constitution binds only parties to the litigation, and as to persons not parties thereto the clause has no application. In *Hansberry* v. *Lee*, 311 U. S. 32, this Court stated that the general rule is that in a case where one is not designated as a party or to which he has not been made a party by service of process, the judgment is not entitled to full faith and credit.

There are many cases in New York which hold that while a divorce decree of another State is binding upon the husband and the wife, it is not so as to the child. (*Matter of DeSaulles*, 101 Misc. 447; *People ex rel. Pickle* v. *Pickle*, 215 App. Div. 38; *Matter of Stewart*, 77 Misc. 524.) They proceed on the theory that the question is not so much the relative rights of the parents, as the rights of the children. Being minors they are unable to act for themselves and the Court, after an examination of the facts, determines what is best for them.

Judge Cardozo in *Finlay* v. *Finlay*, 240 New York 429, stated the attitude of the New York Courts as follows:

> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. • • •
>
> "The chancellor acts as parens patriae to do what is best for the interest of the child. • • • He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. He interferes for the protection of infants, *qua infants*, by virtue of the prerogative which belongs to the Crown as parens patriae."

The New York Courts have frequently asserted the doctrine that a decree of another State involving custody of infants does not diminish the prerogative of the New York Supreme Court, as successor to the Chancellor, to act as *parens patriae*. (*People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317; *In re Bull*, 266 App. Div. 290, aff'd 291 N. Y. 892; *Young* v. *Roe*, 265 App. Div. 858, aff'd 290 N. Y. 293; *People ex rel. Allen* v. *Allen*, 105 N. Y. 628.) The Court decides, in the light of all the facts and circumstances, what is best for the interests of the infant. The foreign decree is taken into consideration as a fact or circumstance bearing upon the discretion to be exercised, but without dictating or controlling it (*People ex rel. Allen* v. *Allen, supra*).

The petitioner claims that there was no change of circumstances after the entry of the Florida decree to justify the Court in making a change of the custody provisions and therefore under the New York authorities, the decision of Judge Benvenga was incorrect. The case of *Ansorge* v. *Armour*, 267 N. Y. 492, cited by petitioner, is an action by an attorney who had represented a wife in habeas corpus proceedings for the custody of her child, to recover from the husband the reasonable value of his services. The custody question was therefore only indirectly involved. Other cases, however, have asserted the proposition that in the absence of a change of circumstances, the decree of the sister state should not be disturbed, and full faith and credit should be given thereto. But the very fact that a decree of another state may or may not be given faith and credit, depending on whether or not there is a change of circumstances, impairs the validity of the doctrine that custody provisions are entitled to full faith and credit. If those provisions are entitled to recognition, it would seem that they should continue to be so entitled, as long as those provisions

remain in the original decree. But undoubtedly, occasions arose when changes of conditions required prompt intervention by the Courts to guard the welfare of infants and so the theory of change of circumstances came into being.

In the last analysis, by a change of circumstances is meant that a new set of conditions has arisen that requires the Court to intervene for the protection of the infant. Yet there may be cases where, though strictly speaking there would be no change of circumstances, there would undoubtedly be intervention by the Court for the infant's protection. In the present case, the Florida Court was unaware of facts bearing on the mother's habits. Such lack of knowledge certainly should not bar a new examination of the facts in New York State, if it militated against the child's health and welfare. Suppose the parent who obtained the decree awarding custody was a homicidal maniac or afflicted with some disease which the child might contract if permitted to remain with the parent, and those facts were unknown to the Court granting the decree. Strictly speaking, if the custody question came up in another state immediately after the decree was obtained, there would be no change of circumstances. Yet there is no doubt that the Court would intervene and make such direction as would be necessary for the infant's best interests. The question should be therefore, not whether there is a change of circumstances, but what is essential to the welfare of the infant.

The present tendency of the New York Courts is to consider solely the interest of the infant, despite the foreign decree. (*In re Bull, supra; People ex rel. Herzog* v. *Morgan.*) Furthermore, the same tendency was noted by Mr. Justice Stone in his dissenting opinion, *Yarborough* v. *Yarborough*, 290 U. S. 202, footnote at page 223. He called attention to cases in many jurisdictions and other authorities on the proposition that conclusive force

is given to the determination of the state wherein the child resides, as long as that residence continues, but that upon a change of residence, the question will be open in the state to which the change is made.

Both *Davis* v. *Davis*, 305 U. S. 32, and *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226, cited by the petitioner, deal with the status of husband and wife and do not involve the specific question of custody.

Petitioner's brief (p. 11) states that it is not disputed that at the time of the entry of its decree, the Florida Court had control of the custody of the child. But as appears from the petition (p. 2) the child was not physically in the State of Florida on April 20, 1945, the date when the decree was entered. On April 19, 1945, the father took the child out of the State, in a peaceful manner, not as in *Pickle* v. *Pickle*, 215 App. Div. 38, where the parent who removed the child used force and violence.

Where the infant is not in the jurisdiction at the time of the decree awarding its custody the Florida Courts have held that such decree is not protected by the full faith and credit clause. (*State ex rel. Rasco* v. *Rasco*, 139 Fla. 349.) To the same effect is the District of Columbia case of *Seeley* v. *Seeley*, 30 App. D. C. 191, certiorari denied 209 U. S. 544.

The Florida decree does not prohibit the father's right of visitation and access. Such right of visitation and access should not be destroyed by that decree obtained *ex parte* and in all probability without a careful examination of the facts bearing upon the custody question. In the absence of a specific provision denying such right, the father is entitled thereto. (See opinion of Judge Benvenga and cases cited therein, R. 58). The details of the order and the power to order a bond were in the discretion of the Court making the same. See opinion of Judge Benvenga and cases cited therein (R. 59).

As the New York Court of Appeals said in *People ex rel. Herzog* v. *Morgan, supra*:

> "* * * The Special Term judge saw and heard the witnesses. He was face to face with the infants whose paramount interests were to be fostered. The facts that made his duty clear to him can at this distance be seen by us only, as it were, through a glass darkly. Our conclusion is that in all human probability the first-made findings of the Special Term are attested by the weight of the evidence."

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EMANUEL N. FRANKEL,
Counsel for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1946

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSE HALVEY,
Petitioner,

—against—

JOHN F. HALVEY, Custodian of JOHN ARTHUR HALVEY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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INDEX

PAGE

Statement of Matter Involved 1

Argument 3

POINT I

The custody portion of the Florida decree is not entitled to full faith and credit because there was no jurisdiction either over the subject-matter or over the person of the respondent to enable Florida to enter that portion of the decree 3

Custody Not Essential to Cause of Action for Divorce 6

Child or Anyone in His Behalf May Challenge Custody Portion of Decree 8

Child Domiciled in New York When Decree Was Made 10

In Any Event There Was No Custody Change 13

Williams v. North Carolina Not Controlling 14

POINT II

The custody portion of the Florida decree is not final and, therefore, is not entitled to full faith and credit 15

PAGE

POINT III

Assuming that the custody portion of the Florida decree was entitled to full faith and credit, New York gave the Florida decree all the faith and credit to which it was entitled 16

POINT IV

The Florida decree was not binding on the child nor on the court as parens patriae. Assuming that force may be given to the Florida decree as long as the child lived in Florida, when he came to New York, New York was not bound by the Florida decree 19

CONCLUSION

The order should be affirmed with costs 22

CASES

	PAGE
Alaska Packers Assn. v. Industrial Accident Commissioner, 294 U. S. 532, 547, 548	13
Alderman, In Re, 157 N. C. 507, 73 S. E. 126	21
Allen v. Allen, People ex rel., 105 N. Y. 628	22
Andrews v. Andrews, 188 U. S. 14, 39	9
Ashley, Matter of, 113 Or. 43, 231 Pac. 153	16
Beard v. Beard, 21 Ind. 321	7
Beekman v. Beekman, 53 Fla. 858, 43 So. 923	10
Bort, Matter of, 25 Kan. 308	8, 9
Brandon v. Brandon, 154 Ga. 661, 115 S. E. 115	4, 5
Bull, Matter of, 266 App. Div. 290, affd. 291 N. Y. 792	20
Burge v. Burge, 88 Ill. 164	14
Comfort v. Comfort, 17 Cal. 2nd 736, 112 Pac. 2d 259, 262	8
Davis v. Davis, 305 U. S. 32	1
Dekraft v. Barney, 2 Hayw. & H. 405, Fed. Cas. #18,988	7
De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345	4
Duryea v. Duryea, 46 Ida. 412, 269 Pac. 987	4, 12
Erving, Matter of, 109 N. J. Eq. 294, 157 A. 161	20, 21
Esenwein v. Commonwealth, 325 U. S. 279, 282-283	15
Fall v. Eastin, 215 U. S. 1	12
Finlay v. Finlay, 240 N. Y. 429	19
Frazier v. Frazier, 109 Fla. 164, 147 So. 464	15, 17

PAGE

Garner v. Garner, 56 Md. 427 7
Gedney v. Gedney, 117 Fla. 686, 158 So. 288 12
German Savings & Loan Assn. v. Dormitzer, 192 U. S. 125 ..... 4, 9
Glass v. Glass, 260 Mass. 562, 157 N. E. 621 11
Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598 ..... 12, 21
Groves, In Re, 109 Wash. 112, 186 Pac. 300 21

Haddock v. Haddock, 201 U. S. 562 ..... 4, 18
Hardin v. Alden, 9 Me. 140 7
Harding v. Harding, 198 U. S. 317 18
Harris v. Harris, 115 N. C. 587, 20 S. E. 187 4
Hernandez v. Thomas, 50 Fla. 522, 39 So. 641 13
Herzog v. Morgan, People ex rel., 287 N. Y. 317, 322 ..... 13, 19
Hopkins v. Hopkins, 84 Fla. 500, 94 So. 157 12

Jacquet v. DiSimone, 175 La. 617, 143 So. 710 14

Kennedy v. Ryall, 67 N. Y. 379, 386 10
Kline v. Kline, 57 Iowa 386, 10 N. W. 825 ..... 4, 21

Lamar v. Micou, 112 U. S. 452, 469-470 10
Lanning v. Gregory, 100 Tex. 310, 99 S. W. 542 12
Lindgren, Matter of, 293 N. Y. 18 9
Lynde v. Lynde, 181 U. S. 187 16

Meadows v. Meadows, 78 Fla. 576, 83 So. 392 ..... 15, 17
Milliken v. Meyer, 311 U. S. 457, 462 ..... 4, 9
Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860 ..... 12, 21
Multer v. Multer, People ex rel., 107 Misc. 58, 63 16

Natl. Exchange Bank v. Wiley, 195 U. S. 259 4

	PAGE
Olmsted v. Olmsted, 190 N. Y. 458, 466, 467, affd. 216 U. S. 386	9
Payton v. Payton, 29 N. M. 618, 225 Pac. 576	4
People v. Baker, 76 N. Y. 78	6
Prosser v. Warner, 47 Vt. 667	7
Rigney v. Rigney, 127 N. Y. 408, revd. on other grounds, sub nom. Laing v. Rigney, 160 U. S. 531	7
Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779	4
Seeley v. Seeley, 30 App. D. C. 191, cert. den. 209 U. S. 544	4
Sistare v. Sistare, 218 U. S. 1, 17	16, 18
State ex rel. Rasco v. Rasco, 139 Fla. 349, 190 So. 510	4, 6
State Farm Ins. Co. v. Duell, 324 U. S. 154, 160	13
Steele v. Steele, 152 Misc. 365, 118 So. 721	4, 21
Stewart, Matter of, 77 Misc. 524	20
Titcomb v. Superior Court, 220 Cal. 34, 29 Pac. 2d 206	22
Van Storch v. Griffin, 71 Penn. St. 240	7
Weber v. Redding, 100 Ind. 448, 163 N. E. 269	12
Williams v. North Carolina, 317 U. S. 287; 325 U. S. 226	1, 3, 6, 14
Wilson v. Wilson, 136 Va. 643, 118 S. E. 270	4
Yarborough v. Yarborough, 290 U. S. 202, 211	5, 10

STATUTES

	PAGE
Florida §4993, Compiled General Laws, 1927	6, 12, 15
Florida §5884, Compiled General Laws, 1927	5, 11
New York §70, Domestic Relations Law	2, 12, 19

TEXTS

2 Bishop, Marriage, Divorce, and Separation, §23	6
2 Black, Judgments, §§925, 933	7
Restatement, Conflict of Laws	
§117	10
§146, comment c	12
§148	21
Restatement, Judgments, §33	10

Supreme Court of the United States

OCTOBER TERM, 1946

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSE HALVEY,

Petitioner,

—against—

JOHN F. HALVEY, Custodian of JOHN ARTHUR HALVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

This court granted certiorari on asserted conflict with the determinations in *Davis* v. *Davis* (305 U. S. 32) and *Williams* v. *North Carolina* (317 U. S. 287; 325 U. S. 226) and on asserted repugnancy to the constitutional guaranty of full faith and credit.

Statement of Matter Involved

On April 10, 1937 petitioner and respondent were married in New York. On February 4, 1938 the infant son, whose custody is in issue, was born in New York.

Petitioner and respondent since their said marriage and their infant son since his birth, lived together in New York, until April 12, 1944, when petitioner, without the knowledge or consent of respondent, left for Florida with the child.

Respondent remained in New York. Petitioner lived in Florida with a married sister and the latter's husband.

On February 22, 1945, petitioner commenced suit for divorce in Florida apparently on the ground of cruelty, a ground not recognized in New York. Service was effected on respondent by publication. He was not a resident of Florida; he was not served within Florida and he did not appear in the action.

On April 19, 1945 during the pendency of the Florida cause, respondent, without the knowledge or consent of petitioner, peaceably took the child out of Florida and brought him back to New York.

On April 20, 1945 the Florida divorce decree was filed and on April 21, 1945, it was recorded.

By that decree, petitioner was granted an absolute divorce from respondent and she was awarded custody of the child. There is no finding that respondent was an unfit person, or that petitioner was fit to care for the child. There is no showing that any testimony was adduced on that question.

On May 2, 1945 petitioner came back to New York, and a writ of habeas corpus was issued, on her petition under section 70 of the New York Domestic Relations Law, to inquire into the detention of the child. On May 4, 1945, the matter came on for hearing before the New York Supreme Court. Both petitioner and respondent appeared in person and by counsel. The child was also present in court. After a complete hearing at which all the facts were adduced and after an interview with the child, the court entered an order (R. 3) determining that the custody of the child remain with the mother, giving the father certain rights of visitation, and requiring petitioner to post a $5,000 bond to insure compliance with its terms.

The opinion (R. 56) upon which the order is based is officially reported in 185 Misc. 52. Petitioner appealed to the Appellate Division of the Supreme Court, where the order was affirmed (269 App. Div. 1019). Petitioner further appealed to the Court of Appeals. The arguments of petitioner in that court were directed solely to the proposition that the custody provisions of the Florida divorce decree were entitled to full faith and credit, which was not given to it by New York, since that there was no change in circumstances after rendition of the Florida decree. The Court of Appeals unanimously affirmed the determination of the Appellate Division (295 N. Y. 836).

Apparently this Court has not yet determined whether a custody decree is within the full faith and credit clause.

ARGUMENT

POINT I

The custody portion of the Florida decree is not entitled to full faith and credit because there was no jurisdiction either over the subject matter or over the person of the respondent to enable Florida to enter that portion of the decree.

Florida granted petitioner a divorce on constructive service. Defendant was never a resident of Florida but was at all times a resident of New York. He was not served within Florida and did not appear in the action. Since respondent has not attacked the *bona fides* of the petitioner's domicile in Florida, that portion of the decree which grants petitioner a divorce is valid and entitled to full faith and credit. (*Williams* v. *North Carolina*, 317 U. S. 287.)

However, at the time of the rendition of the decree on April 20, 1945, both respondent and the child were not within the jurisdiction of the Florida court. Florida had no authority to award custody of the child to petitioner. (*State ex rel. Rasco* v. *Rasco*, 139 Fla. 349, 190 So. 510; *Seeley* v. *Seeley*, 30 App. D. C. 191, cert. den. 209 U. S. 544; *Kline* v. *Kline*, 57 Iowa 386, 10 N. W. 825; *Harris* v. *Harris*, 115 N. C. 587, 20 S. E. 187; *Brandon* v. *Brandon*, 154 Ga. 661, 115 S. E. 115; *Wilson* v. *Wilson*, 136 Va. 643, 118 S. E. 270; *De La Montanya* v. *De La Montanya*, 112 Cal. 101, 44 Pac. 345; *Steele* v. *Steele*, 152 Miss. 365, 118 So. 721; *Payton* v. *Payton*, 29 N. M. 618, 225 Pac. 576; *Rodgers* v. *Rodgers*, 56 Kan. 483, 43 Pac. 779; *Duryea* v. *Duryea*, 46 Ida. 412, 269 Pac. 987.)

When the full faith and credit clause of the Constitution is invoked to compel enforcement of a judgment or decree in another state, the question of the jurisdiction of the court over either the person or the subject matter is always open to inquiry (*Milliken* v. *Meyer*, 311 U. S. 457, 462; *Haddock* v. *Haddock*, 201 U. S. 562; *Natl. Exchange Bank* v. *Wiley*, 195 U. S. 259; *German Savings & Loan Assn.* v. *Dormitzer*, 192 U. S. 125.

In *Brandon* v. *Brandon* (*supra*), the facts were exactly the same as in our case. There the husband and wife who lived in Ohio, separated. The husband went to Georgia and took the child with him. Then the wife came to Georgia and took the child with her back to Ohio. Thereafter she filed suit for divorce in Ohio. Service on the husband was by publication.

After the institution of the divorce action, but prior to the rendition of the decree, the husband went to Ohio and, while the wife was away from home, took the child and brought him back to Georgia.

Ohio granted a divorce to the wife and awarded her custody of the child. She then came to Georgia and instituted habeas corpus proceedings. There was no change of circumstances between the time of the rendition of the decree and the institution of the habeas corpus proceedings. Georgia held that (1) the child's presence in Ohio at the time of the institution by the wife of the divorce action was only temporary and did not give Ohio jurisdiction to decree custody; (2) so much of the divorce decree as awarded custody to the mother was void for want of jurisdiction; (3) the custody portion of the divorce decree was not binding on the father and did not preclude him from asserting his legal right to the child's custody.

In our case the parties were married in New York. The matrimonial domicile was in New York. The child was born in New York. In April 1944 petitioner left her husband and, without his knowledge or consent, took the child with her to Florida (R. 56). Under these circumstances, the residence of the child in Florida with the mother was only temporary. The domicile of the child remained with the father in New York.

The divorce action is one in equity (5884, Compiled General Laws, Florida, 1927), which speaks as of the time of the decree. The Florida decree was rendered on April 20, 1945 and recorded on April 21, 1945 (R. 54). The day before the rendition of the decree, on April 19, 1945 the father took the child out of the jurisdiction of Florida (R. 16-17). Therefore, at the time of the rendition of the decree, Florida did not have jurisdiction to decree custody, since there was no jurisdiction over the person of defendant, the domicile of the child was at all times in New York, and the child himself was physically outside the jurisdiction.

The *Brandon* case was cited with approval in the majority opinion of this court in *Yarborough* v. *Yarborough* (290

U. S. 202, at p. 210) and by Florida in *State ex rel. Rasco* v. *Rasco* (139 Fla. 349, 190 So. 510).

If it be said that the child was outside the jurisdiction of Florida at the time of the rendition of the decree without the knowledge or consent of petitioner and that respondent can gain no right by his act of removing the child from Florida for the purpose of defeating the decree entered in that jurisdiction, it is also the fact that the child was in Florida at the time of the institution of the divorce action, away from his domicile and that of his father without the father's knowledge or consent, and petitioner can gain no right by her act of removing the child from New York to Florida for the purpose of giving Florida jurisdiction.

Custody Not Essential to Cause of Action for Divorce

A divorce action and the decree resulting therefrom have several different aspects. Insofar as the action operates on the matrimonial status of the parties, it is not a mere *in personam* action. (*Williams* v. *North Carolina*, 317 U. S. 287, 297-298.) Accordingly, the *Williams* case held that, in the absence of an attack on the domicile of the plaintiff in the divorce action, a divorce decree granted in one state, even though based on constructive service, was entitled to full faith and credit.

There are, however, several incidents to a cause of action for divorce which are not essential parts of the cause of action. One is the demand for custody. (§4993, Compiled General Laws, Florida, 1927.) Another is the demand for alimony.

It is well established that as to alimony and costs, the action for divorce is *in personam*. (*People* v. *Baker*, 76 N. Y. 78; 2 Bishop, *Marriage, Divorce, and Separation*,

§23; 2 Black, *Judgments*, §§925, 933.) Therefore, while a divorce decree based on constructive service may be valid as affecting the marital status, of the parties, it does not bind the defendant as to sums allowed for alimony and costs where the judgment was rendered in the state in which the wife is a resident citizen, against her non-resident husband, who has not appeared in the action and has not been served with process in the state in which the action was brought. (*Rigney* v. *Rigney*, 127 N. Y. 408, revd. on other grounds, *sub nom. Laing* v. *Rigney*, 160 U. S. 531; *Beard* v. *Beard*, 21 Ind. 321; *Prosser* v. *Warner*, 47 Vt. 667; *Hardin* v. *Alden*, 9 Me. 140; *Garner* v. *Garner*, 56 Md. 127; *Van Storch* v. *Griffin*, 71 Penn. St. 240.)

The judgment for alimony and costs cannot be supported on the ground that it is a mere incident of and subordinate to the right to divorce, and the jurisdiction which is sufficient to support a decree changing the marital status of the parties will not sustain a judgment for alimony and costs. (*Rigney* v. *Rigney, supra.*)

Likewise, it should be held that as to custody the action for divorce is *in personam.* Therefore, while the divorce decree based on constructive service may be valid as affecting the marital status of the parties, it does not bind defendant as to custody of the child, where the judgment was rendered in a state in which the wife is a resident citizen, against her non-resident husband, who has not appeared in the action and has not been served with process in the state in which the action was brought.

In *Dekraft* v. *Barney* (2 Hayw. & H. 405, Fed. Cas. #18,288) a decree of divorce rendered in Iowa in favor of the wife, which awarded custody of the children to her, was held not conclusive or even admissible as evidence that the father was an unfit person to have custody of the children in a subsequent proceeding in the District of Columbia on

the ground that, the decree rendered upon constructive service of process against the husband, a non-resident of Iowa, did not have the effect of personal judgment or decree.

The custody portion of a divorce decree requires control by the court over the persons of the parties so that it may enforce its commands with respect to each. The custody provision resembles in this respect an injunction, in that it enjoins the party having custody to deliver the child to the party entitled to custody at the appointed time and further enjoins the one not entitled to custody at the time in question not to molest or interfere with either the child or the person who is entitled to custody. It is well settled that an injunction is a personal decree because it operates on the person of the defendant by commanding him to do or desist from certain action. An injunction obtained by constructive service on a non-resident is not entitled to the protection of the full faith and credit clause. (*Comfort* v. *Comfort*, 17 Cal. 2nd 736, 112 Pac. 2d 259, 262.)

Child or Anyone in His Behalf May Challenge Custody Portion of Decree

Long ago (*Matter of Bort*, 25 Kan. 308), Mr. Justice Brewer, afterwards a Justice of this Court, criticized a claim similar to that of petitioner (invoking the benefit of the full faith and credit clause to a foreign divorce decree which included custody of a child and insisting that, unless some subsequent change in the relative position and fitness of the respective parties is shown, the custody directed in the divorce decree cannot be changed) as resting on the assumption that parents have some property right in the possession of their children, a claim which was repudiated.

It has been held that the minor child of parents divorced in another state can challenge the validity of the foreign

decree, even though the parents themselves could not. (*Matter of Lindgren*, 293 N. Y. 18.) If the child can maintain an action of that nature, certainly he may challenge the custody portion of the decree. It makes no difference that the proceeding is brought on in name, by the parent.

The prime consideration is the welfare of the child. The authority of the court is so broad that custody may be fixed even in disregard of the legal rights of parents, where the welfare of the child requires it. A child is not a chattel which must be restored to its lawful owner in all circumstances. Like the parent, the child has rights, and the strict legal rights of parents can only be enforced with proper regard to the best interests of the child.

The law does not visit on the child the disability imposed on parents to attack a decree. The rights asserted in this proceeding are not property rights to which either parent is entitled. The child was not a party to the Florida divorce action. Accordingly, the judgment there entered was not conclusive upon him or upon rights asserted in New York on his behalf. In these circumstances, the child as a third party may challenge the validity of the custody portion of the Florida decree. (See *Olmsted* v. *Olmsted*, 190 N. Y. 458, 466, 467, affd. 216 U. S. 386; *Andrews* v. *Andrews*, 188 U. S. 14, 39; *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128; *Milliken* v. *Meyer*, 311 U. S. 457, 462.)

If the minor child is not a party to the divorce action and can never be bound by the custody provisions of the foreign decree and the only inquiry in another state is what is best for the child's welfare, a custody decree should never be given full faith and credit. (*Matter of Bort*, 25 Kan. 308.)

Child Domiciled in New York When Decree Was Made

The subject matter or *res* here involved was the child and its custody. In the absence of jurisdiction over the child, the decree was void and not entitled to recognition insofar as it purported to deal with the child's custody. A court's jurisdiction with respect to a child's custody depends on its domicile when the decree was rendered. (*Restatement, Judgments*, §33; *Restatement, Conflict of Laws*, §117.) The law of the domicile governs the status of a person. (*Lamar* v. *Micou*, 112 U. S. 452, 469-470.)

An infant cannot change his own domicile. The domicile of an infant is the domicile of the father. (*Lamar* v. *Micou*, *supra*, at p. 470; *Kennedy* v. *Ryall*, 67 N. Y. 379, 386.) Under Florida law the legal domicile of the child was that of the father, he not having consented to any change of domicile on the part of either the mother or the child. (*Beckman* v. *Beckman*, 53 Fla. 858, 43 So. 923.) The child's domicile was that of his father in New York and his domicile continued to be in New York at all times. He was not capable by his own act of changing his domicile.

The child's temporary residence in Florida when the divorce action was begun did not effect a change of his domicile. (*Yarborough* v. *Yarborough*, 290 U. S. 202, 211.) While the Justice of the New York Supreme Court who tried the custody proceeding in that state made no finding as to the child's domicile at the time of the rendition of the decree (R. 57), the undisputed facts establish that New York was the child's domicile.

The reason for the rule that the domicile of a minor child is that of his father is that the father is entitled to his custody and services, and is responsible for his tutelage, discipline, and support of the child. The doctrine as to domicile rests upon the reciprocal rights and duties of

father and child. It obtains even though the parents may be living apart. Thus while a married woman may acquire a domicile different from that of her husband in appropriate circumstances, in the absence of some neglect of parental duty on the part of the father, or some statute, the domicile of minor children remains that of the father. (*Glass* v. *Glass*, 260 Mass. 562, 157 N. E. 621, citing many cases.)

The domicile of the child is with the parent in whom legal custody and the right of control are vested. At common law the father had the superior legal right to the custody of the minor child. The Florida statute (5884, Compiled General Laws, Florida, 1927) is to the effect that the mother jointly with the father shall be the natural guardian of their children during infancy. This statute makes the mother the "joint" guardian of her children with her husband. To say that the domicile of the child was in Florida because the mother took him there without the knowledge or consent of the respondent, whose domicile remained at all times in New York, would be to give the wife legal custody of the child of the parties while being separated from her husband against his wishes and to give her the several and exclusive control of the child, and not a control of the child jointly with the father, as the statute commands.

The statute would then be made to work an entire loss of the common law rights of the father, at the option of the wife, if by any means she could possess herself of the child. Her rights are made "equal" with the husband, not paramount or superior, and can only be enjoyed and exercised under circumstances in which the husband's equal rights may be secured to him. When they are separate from and independent of each other, the joint guardianship cannot be exercised and the husband is remitted to his common law rights, which give him a superior legal right to the child's custody.

Florida has determined that, in the absence of a finding that the father was an unfit person to care for his child (and there is no such finding in the instant Florida decree), the father is entitled as a matter of right to the custody of the child. (*Hopkins* v. *Hopkins*, 84 Fla. 500, 94 So. 157; *Gedney* v. *Gedney*, 117 Fla. 686, 158 So. 288.) So that, under Florida law, the domicile of the child was with the father in New York when the Florida court assumed to act.

A court granting a divorce cannot award to either party the custody of a child until the child is domiciled in the state. (*Restatement, Conflict of Laws*, §146, comment *c*.) Since the child was not physically present in the state when the decree was rendered, even temporary custody could not have been awarded. A state which is the temporary residence of a child, not the domicile, cannot confer the right to custody. (*Lanning* v. *Gregory*, 100 Tex. 310, 99 S. W. 542.) A decree for custody rendered in a state where the child is not domiciled is void for lack of jurisdiction. (*Milner* v. *Gatlin*, 139 Ga. 109, 76 S. E. 860; *Duryea* v. *Duryea*, 46 Ida. 512, 269 Pac. 987; *Weber* v. *Redding*, 100 Ind. 448, 163 N. E. 269; *Griffin* v. *Griffin*, 95 Ore. 78, 187 Pac. 598.)

Just as a divorce decree seeking to apportion the rights of the parties to realty is not conclusive with respect to land outside the state (*Fall* v. *Eastin*, 215 U. S. 1), so will the divorce decree seeking to determine the right of the mother to custody with respect to a child domiciled outside Florida not be conclusive.

The full faith and credit clause may not be used to compel New York to subordinate its own statute (§70, Domestic Relations Law) dealing with custody of children concerning which New York is competent to legislate to the Florida statute (§4993, Compiled General Laws, 1927).

One who challenges the power of a state to enforce in its own courts its own statutes on such ground carries the burden of showing that of the conflicting interests involved those of the foreign state are superior to those of the forum. (*State Farm Ins. Co.* v. *Duell*, 324 U. S. 154, 160; *Alaska Packers Assn.* v. *Industrial Accident Commissioner*, 294 U. S. 532, 547, 548.) That burden has not been carried here. All that has been shown is that the interests of both states are the same. The paramount interests of each is the welfare of the children. (*Hernandez* v. *Thomas*, 50 Fla. 522, 39 So. 641; *People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317, 322.) The interest of Florida is not superior to that of New York in this regard. It is New York's prerogative to select the appropriate means of protecting infants resident within its borders and Florida's directives cannot control New York.

In Any Event There Was No Custody Change

An examination of the opinion of the Justice who conducted the hearing in New York (R. 58) and of the order entered thereon (R. 3) shows that the custody provisions of the Florida decree were not changed. Custody of the child still remains with the petitioner.

What the order does, is to recite in detail the reasonable rights of visitation of the respondent. Petitioner chooses to call the particularization of the times of visitation a new grant of custody. That does not make it so. The times of visitation are not being attacked as unreasonable or as an abuse of discretion. Indeed, they cannot be so attacked.

The divorce decree did not divest respondent of his fatherhood. The child is still his child, notwithstanding its custody was awarded to the mother in Florida. A parent against whom an adverse judgment of divorce has been

rendered possesses certain natural rights with respect to his child although custody is given to the other parent. One of these, is the right of access to his child, and the exercise of this right, under reasonable restrictions as the circumstances warrant, should not be withheld.

It was not shown in Florida or in New York that the father's association with the child would not be for the good of the child. The divorce decree contains no express provision barring a right of visitation and there is no finding of facts to justify such provision. New York merely fixed the times which it considered reasonable for the husband to have access to his child. (See *Burge* v. *Burge*, 88 Ill. 164; *Jacquet* v. *DiSimone*, 175 La. 617, 143 So. 710.)

Williams v. North Carolina Not Controlling

There were several "intensely practical considerations" which emphasized the necessity for holding that a divorce granted in the state of domicile of one spouse based on constructive service on the other, resident in a sister state, was entitled to full faith and credit. It would bring considerable disaster to innocent second spouses; it would bastardize the offspring of the second marriage; it would encourage collusive divorces. (*Williams* v. *North Carolina*, 317 U. S. 287, 301.) None of these considerations is here present. Assuming that the custody provisions of the decree are changed, neither spouse is made a bigamist; offspring are not bastardized; and collusive divorces are not encouraged.

The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states here involved. The question of marital capacity will often raise an irreconcilable conflict between the policies of the two states. One must give way in the larger interest of the federal union. But the same conflict

is not present when it comes to custody. The paramount interest of both states is the welfare of the child. The jurisdictional foundation for a decree in one state capable of foreclosing an inquiry into the welfare of the child is different from that required to alter the marital status with extraterritorial effect. (See concurring opinions of Mr. Justice Douglas, in which Mr. Justice Black joined, and the concurring opinion of Mr. Justice Rutledge in *Esenwein* v. *Commonwealth*, 325 U. S. 279, 282-283.)

POINT II

The custody portion of the Florida decree is not final and, therefore, is not entitled to full faith and credit.

The custody portion of the divorce decree is not final, but is in its nature temporary, provisional, and interlocutory. The Florida statute provides (§4993, Compiled General Laws, 1927) that, in a divorce suit, the court shall have power "at any stage of the cause" to make such orders touching the care, custody, and maintenance of the children of the marriage as may be fit, equitable, and just, and as their best interests may require.

Power is thus reserved in the statute to alter and modify the decree regarding custody at any time. (*Frazier* v. *Frazier*, 109 Fla. 164, 147 So. 464; *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392.)

As regards alimony, this court has held that a decree therefor is not entitled to full faith and credit where by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree to such an extent that no absolute or vested right at

taches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due. (*Sistare* v. *Sistare*, 218 U. S. 1, 17.) Where enforcement of alimony is subject to the discretion of the court which rendered it, which might at any time alter it, that portion of the decree is not entitled to full faith and credit. (*Lynde* v. *Lynde*, 181 U. S. 187; *Sistare* v. *Sistare*, *supra*, at p. 16.)

As regards custody, the portion of the decree falls into the same category. The matter of the custody of a child involved in a divorce suit is always "in the bosom of the court of whom the child is a ward." It is not final and conclusive against subsequent modification. For that reason the custody portion of a divorce decree is never entitled to full faith and credit in a sister state. (*Matter of Ashley*, 113 Or. 43, 231 Pac. 153; *People ex rel. Multer* v. *Multer*, 107 Misc. 58, 63, 65.) This is not a disregard or impeachment of a judicial proceeding of a sister state, but is giving to it all the faith and credit it possesses there.

POINT III

Assuming that the custody portion of the Florida decree was entitled to full faith and credit, New York gave the Florida decree all the faith and credit to which it was entitled.

The principal contention of the petitioner in the New York courts was that the law in New York commanded that, unless the respondent could show a change of circumstances since the entry of the Florida decree, New York must give effect to the Florida decree. That contention overlooks the entire basis of the full faith and

credit clause. It is not a New York decree to which petitioner contends full faith and credit should be given. It is a Florida decree. The determining question is, therefore, not what is the New York law but what is the Florida law, with respect to the right of a court to change a custody decree. The full faith and credit clause requires that New York give to the Florida decree all the force and credit which the Florida decree possesses in Florida and no more.

In Florida a custody decree may be changed on altered conditions arising since the decree *or* because material facts bearing on the question of custody existing at the time of the decree were unknown to the court. (*Frazier* v. *Frazier*, 109 Fla. 164, 147 So. 464.)

So in *Meadows* v. *Meadows* (78 Fla. 576, 83 So. 392) a divorce decree gave custody of a minor child to the mother. The father petitioned for a change of custody. The lower court sustained a demurrer to that petition on the ground that, in the absence of a showing of a change of circumstances, the awarding of the custody of the child by the final divorce decree was *res judicata* as to the conduct of the mother prior to the rendering of the decree. On appeal that order was reversed because the custody of a minor child was a proper consideration for the chancellor at any time, even if facts in issue could have been considered at a previous hearing, if such facts were not presented or considered at a former hearing.

In our case respondent did not appear in the divorce action. There is no showing as to what testimony was taken on the subject of the petitioner or respondent being fit persons to have the custody of the child. There is no finding that respondent was an unfit person. Respondent did not appear in Florida and there was no testimony or evidence presented in his behalf as to the fitness of both

parents. Such evidence was presented in the New York court where both parents appeared in person and by counsel. In addition, the Trial Judge spoke to the child and obtained an expression of his desires on the subject. Upon a consideration of these additional facts, all of which were unknown to the Florida court, New York made a direction as to custody, which is not, and cannot in this court be, attacked as an abuse of discretion. The additional facts were not presented or considered by the Florida court at the time of the rendition of its decree. Under such circumstances, Florida had the power to change the custody decree. If Florida has discretion to modify the custody decree New York has like power.

Where a decree rendered by one state is embraced by the full faith and credit clause, that constitutional provision commands the other state shall give to the decree the force and effect to which it was entitled in the state where rendered. (*Haddock* v. *Haddock*, 201 U. S. 562, 567; *Harding* v. *Harding*, 198 U. S. 317.) If the courts of that state have authority in their discretion to modify the decree at any time, even in the absence of a change of circumstances, the courts of another state have like power. (*Sistare* v. *Sistare*, 218 U. S. 1, 17.)

POINT IV

The Florida decree was not binding on the child nor on the court as *parens patriae*. Assuming that force may be given to the Florida decree as long as the child lived in Florida, when he came to New York, New York was not bound by the Florida decree.

New York took jurisdiction of this proceeding under §70 of its Domestic Relations Law, which gives to the court, the duty of determining custody of children within the state. The New York court is thereby admonished in peremptory language to determine custody in accordance with the best interest of the child.

The Florida decree did not diminish the prerogative of the New York Supreme Court as *parens patriae*. (*People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317.) By means of that paternal jurisdiction the court was to provide for the best interests of the child after the manner of a wise, affectionate, and prudent parent. (*Finlay* v. *Finlay*, 240 N. Y. 429.)

The provisions of a decree as to custody of a child are distinguishable, in respect of recognition and enforcement, from the provision of the decree terminating the marital relationship, as well as from the provisions of the decree for alimony, in that custody involves the welfare of children, who are not parties to the proceedings in which the decrees are rendered.

While the Florida decree might determine the marital status of the parties as between themselves, whether the custody provisions of the decree are *res judicata*, as between father and mother, are beside the issue, in this habeas corpus proceeding, which is whether that decree can bind the New York court as against the infant boy in deter-

mining where his custody should go, he being now a resident of New York and subject to its jurisdiction.

Each state has the power to determine the status of persons within its jurisdiction and the Florida court had no power to make any order with respect to the boy within the jurisdiction of the New York court which would be binding on him. (*Matter of Erving*, 109 N. J. Eq. 294, 157 A. 161.) The state as *parens patriae* has an interest in the proper training and education of its children. The state has the right to insist that natural parents fulfill their obligations not only to their children, but to the state. To this extent the state is interested.

The question involved is not so much the relative rights of the parents as between themselves, as the rights of the child. He was not a party to the divorce action and is not bound by its decree. Being a minor, he could not act for himself, and the court acts upon the petition and evidence produced in his behalf. Whatever orders the court may make are for the benefit of the child, whose interest and welfare are first considered, even as against the natural claims of the parents themselves. The decree of the court of another state ought not to be regarded as binding on the state itself, or the child, where its welfare is at stake. (*Matter of Stewart*, 77 Misc. 524.)

In accordance with this doctrine, despite the fact that there was no variance in circumstances which would justify a change in the custody arrangements agreed to by the parents and adopted by incorporation in a foreign divorce decree, New York has decided that a foreign judgment of divorce does not prevent New York from considering evidence as to the welfare of its infant ward resident in New York. (*Matter of Bull*, 266 App. Div. 290, affd. 291 N. Y. 792.) That is in accordance with the general rule.

When the child ceases to be a resident of the state in which its custody has been awarded and becomes domiciled in, or a resident of, another state, its custody in the latter state and the recognition and enforcement of the sister state decrees are matters closely connected with the right of sovereignty in such state to protect and promote the welfare both of society and of the individual members thereof within its borders.

Each state reserves to itself the right to judicial determination of the status of its inhabitants. When that status becomes a matter of concern of organized government, it necessarily follows a state will not yield to a foreign jurisdiction, the exclusive right to determine the status of its residents. Accordingly, in such circumstances the sister-state decree is without extraterritorial effect.

In any event, such effect may be denied it, on the ground that the child has become a domiciliary or resident of the state in which such recognition or enforcement is sought. Even though conclusive force may be given to the determination of the state where the child resides so long as that residence continues, upon a change of residence the question will be open in the state to which the change is made, and such decree is without force in the foreign jurisdiction into which the child is removed. (*Matter of Erving*, 109 N. J. Eq. 294, 157 A. 161; *Milner* v. *Gatlin*, 139 Ga. 109, 76 S. E. 857; *Steele* v. *Steele*, 152 Miss. 365, 118 So. 721; *In Re Alderman*, 157 N. C. 507, 73 S. E. 126; *Griffin* v. *Griffin*, 95 Ore. 78, 187 Pac. 598; *In Re Groves*, 109 Wash. 112, 186 Pac. 300; *Kline* v. *Kline*, 57 Iowa 386, 10 N. W. 825; *Restatement, Conflict of Laws*, §148.)

If it appears that the circumstances upon which the prior order of another state is based have not changed and that all the facts pertinent to the question have been before the Court, New York, on principles of comity, may refuse to

decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child. (*Titcomb* v. *Superior Court*, 220 Cal. 34, 29 Pac. 2d 206.) New York is not required to give to the Florida decree the force of an estoppel, or the conclusive effect sometimes due to a judgment, but may simply regard it as a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it. (*People ex rel. Allen* v. *Allen*, 105 N. Y. 628.)

CONCLUSION

The order should be affirmed with costs.

Respectfully submitted,

SAMUEL SHAPIRO,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 384.—October Term, 1946.

People of the State of New York, ex rel. Rose Halvey, Petitioner, *v.* John F. Halvey, Custodian of John Arthur Halvey.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 31, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

The Halveys were married in 1937 and lived together in New York until 1944. In 1938 a son was born. Marital troubles developed. In 1944 Mrs. Halvey, without her husband's consent, left home with the child, went to Florida, and established her residence there. In 1945 she instituted a suit for divorce in Florida. Service of process on Mr. Halvey was had by publication, he making no appearance in the action. The day before the Florida decree was granted, Mr. Halvey, without the knowledge or approval of his wife, took the child back to New York. The next day the decree was entered by the Florida court, granting Mrs. Halvey a divorce and awarding her the permanent care, custody, and control of the child.

Thereupon she brought this *habeas corpus* proceeding in the New York Supreme Court, challenging the legality of Mr. Halvey's detention of the child. After hearing, the New York court ordered (1) that the custody of the child remain with the mother; (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods in each year, and (3) that the mother file with the court a surety bond in the sum of $5,000, conditioned on the delivery of the child in Florida for removal by the father to New York for the

periods when he had the right to keep the child with him. 185 Misc. 52. Both the Appellate Division and the Court of Appeals affirmed without opinion. The case is here on a petition for a writ of certiorari which we granted because it presented an important problem under the Full Faith and Credit Clause of the Constitution. Article IV, § 1.

The custody decree was not irrevocable and unchangeable; the Florida court had the power to modify it at all times.[1] Under Florida law the "welfare of the child" is the "chief consideration" in shaping the custody decree or in subsequently modifying or changing it. *Frazier* v. *Frazier*, 109 Fla. 164, 169, 147 So. 464, 466; See *Phillips* v. *Phillips*, 153 Fla. 133, 134–135, 13 So. 2d 922, 923. But "the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing, must be regarded as being of an equally important, if not controlling consideration in adjusting the right of custody as between parents in ordinary cases." *Frazier* v. *Frazier*, 109 Fla. p. 169. Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168; *Jones* v. *Jones*, — Fla. —, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392–393, that "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not presented or con-*

[1] "In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security to be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require." Fla. Stats. (1941) § 65.14.

entered at a former hearing." (Italics added.) Or, as stated in *Frazier* v. *Frazier*, 109 Fla., p. 168, a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the Court and then only for the welfare of the child." The result is that custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere, except as to the facts before the court at the time of judgment. *Minick* v. *Minick*, 111 Fla. 469, 490-491, 149 So. 483, 492.

Respondent did not appear in the Florida proceeding. What evidence was adduced in that proceeding bearing on the welfare of the child does not appear. But we know that the Florida court did not see respondent nor hear evidence presented on his behalf concerning his fitness or his claim "to enjoy the society and association" of his son. *Frazier* v. *Frazier*, 109 Fla., p. 169. It seems to us plain, therefore, that under the rule of *Meadows* v. *Meadows*, *supra*, the Florida court would have been empowered to modify the decree in the interests of the child and to grant respondent the right of visitation, if he had applied to it rather than to the New York court and had presented his version of the controversy for the first time in his application for modification.

So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article IV, § 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress by the Act of May 26, 1790, c. 11, as amended, R. S. § 905, 28 U. S. C. § 687 declared that judgments "shall

have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. See *Davis* v. *Davis*, 305 U. S. 32; *Williams* v. *North Carolina*, 317 U. S. 287. But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. See *Reynolds* v. *Stockton*, 140 U. S. 254, 264. If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause. See *Thompson* v. *Whitman*, 18 Wall. 457; *Griffin* v. *Griffin*, 327 U. S. 220. And if the amount payable under a decree—as in the case of a judgment for alimony—is discretionary with the court which rendered it, full faith and credit does not protect the judgment. *Sistare* v. *Sistare*, 218 U. S. 1, 17. Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (Cf. *Williams* v. *North Carolina*, 325 U. S. 226, 230), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.

In this case the New York court, having the child and both parents before it, had a full hearing and determined that the welfare of the child and the interests of the father warranted a modification of the custody decree. It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida.

The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e. g.*, whether Florida at the time of the original decree had jurisdiction over the child,[2] the father having removed him from the State after the proceedings started but before the decree was entered; whether in absence of personal service the Florida decree of custody had any binding effect on the husband; whether the power of New York to modify the custody decree was greater than Florida's power; whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision.

Affirmed.

MR. JUSTICE JACKSON concurs in the result on the ground that the record before us does not show jurisdiction in the Florida court.

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[2] The legal domicile of the child is usually the domicile of his father. *Minick* v. *Minick*, 111 Fla., p. 490; *Dorman* v. *Friendly*, 146 Fla. 732, 738, 1 So. 2d 734, 736. The power of the Florida courts to award custody of a child is dependent either on the child being legally domiciled in Florida or physically present there. *Dorman* v. *Friendly*, *supra*; *State ex rel. Clark* v. *Clark*, 148 Fla. 452, 4 So. 2d 517.

SUPREME COURT OF THE UNITED STATES

No. 384.—October Term, 1946.

People of the State of New York, ex rel. Rose Halvey, Petitioner, *v.* John F. Halvey, Custodian of John Arthur Halvey.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 31, 1947.]

Mr. Justice Frankfurter, concurring.

Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law. And so, the use of the same legal words and phrases in enforcing full faith and credit for judgments involving the two types of relations ought not to obliterate the great difference between the interests affected by them, and should not lead to an irrelevant identity in result.

The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it. Thus, in judgments affecting domestic relations technical questions of "finality" as to alimony and custody seem to me irrelevant in deciding the respect to be accorded by a State to a valid

prior judgment touching custody and alimony rendered by another State. See the concurring opinion in *Barber* v. *Barber*, 323 U. S. 77, 86, and the dissenting opinions in *Griffin* v. *Griffin*, 327 U. S. 220, at 236 and 248. Compare *Yarborough* v. *Yarborough*, 290 U. S. 202.

Which brings me to the present case. If there were no question as to the power of Florida to provide for the custody of this child in the manner in which the Florida decree of divorce did, I think New York would have to respect what Florida decreed, unless changed conditions affecting the welfare of the child called for a change in custodial care. New York could respond to such changed circumstances. The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate.

Here the lower New York court did not provide for the child's custody on the basis of changed circumstances. While it professed to respect the Florida custody decree, the court acted as though it had independent authority because of the dispersion of the family. Its action seemed to be controlled by the father's right, on the assumption that that was the test of the child's welfare in the circumstances. The order of the lower court was affirmed by the Appellate Division, but that court specifically noted that it did "not adopt in their entirety the views expressed" by the court below. The intermediate tribunal was in turn, affirmed by the Court of Appeals. Of course, if the Florida decree is entitled to no respect, it is not for us to upset the custodial provisions sanctioned by the highest court of New York. Although we are not afforded the guidance that an opinion would give as to the considerations that moved the New York Court of

Appeals to sustain the custodial decree, on the slim record before us I am not justified in finding that the New York Court of Appeals was unmindful of its duty under the Full Faith and Credit Clause to respect a valid Florida judgment.

In determining whether the New York judgment should stand or fall account must be taken of two competing considerations. There is first the presumptive jurisdiction of the court of a sister State—here Florida—to render the judgment for which full faith and credit is asked. The other is the power of a State court—here New York—which has actual control of the child to make provision for the child's welfare. Where, as here, both considerations cannot prevail one must yield. Since the jurisdiction of the Florida court in making the custodial decree is doubtful, New York was justified in exercising its power in the interest of the child. *Williams* v. *North Carolina*, 325 U. S. 226.

A close analysis of the precise issue before us seems to me to require this conclusion. The problem before this Court is the validity of a New York judgment providing for the custody of a child subject to its jurisdiction because within its power. It is our duty to sustain that judgment unless there is clear ground for upsetting it. Apart from the effect of what Florida had previously done, New York's authority to enter this judgment is unquestioned. New York's power is qualified only by her duty under the Full Faith and Credit Clause to respect a Florida judgment. But this duty arises only if there was legal power in the Florida Court to enter the custodial decree, and if in the Florida courts themselves the decree was not subject to the kind of modification which New York here made. On the basis of the meager record before us and in view of the uncertainties of Florida law, we do not have the necessary assurance that Florida had jurisdiction to issue the custodial decree, or that the Florida courts could not enter

a modifying decree precisely like the New York decree before us. So long as there is this uncertainty, we are not justified in finding that New York's judgment was vitiated because of a failure in her duty under the Full Faith and Credit Clause. A full record of the Florida proceedings in the light of applicable Florida law, more securely ascertained than by our independent inquiry, might lead to a different conclusion. As it is, I concur in affirmance of the judgment.

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[March 31, 1947.]

Mr. Justice Rutledge, concurring.

I join in the judgment *dubitante*, in the view that under Florida law *res judicata* has no application to an award of custody[1] and the decree therefore is lacking in any quality of finality which would prevent the court rendering it, or another acquiring jurisdiction of the child's status, from altering it.[2]

The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare. And, if possible, I would avoid such a distressing result, since I think that the controlling con-

[1] In *Minick* v. *Minick*, 111 Fla. 469, 491, the Florida Supreme Court quoted with approval the statement in Schouler on Marriage and Divorce (6th ed.) § 1896: "These judgments [of custody] are necessarily provisional and temporary in character, and are ordinarily not *res judicata*, either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment." See also *Meadows* v. *Meadows*, 78 Fla. 576.

[2] The trial court in New York gave lip service to observing the Florida award of custody to the mother, but awarded the father rights "of visitation" not allowed under the Florida decree; and these included not only visitation during specified hours while the child is to remain in the mother's custody, but also the right to have the custody during more than three months of each year, during which time the mother was given specified visiting rights. The New York appellate courts affirmed the award as made by the trial court.

sideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York,[3] but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.

I am not sure but that the effect of the decision may be that the mother, once the child has been returned to Florida,[4] will then be able to secure another decree there nullifying the father's rights of visitation and custody given by the New York decree,[5] or that in such an event he might lawfully repeat the abduction and secure restoration of those rights in New York. If so, the effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters.

But our function here is limited to application of the full faith and credit clause. I agree that technical notions of finality applied generally to other types of judgment

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[3] See Fla. Stat. Ann. (1943) § 65.14; *Jones* v. *Jones*, 156 Fla. 524, 527; *Green* v. *Green*, 137 Fla. 359, 361.

See *Matter of Rich* v. *Kaminsky*, 254 App. Div. 6; Matter of Bull, 266 App. Div. 290, aff'd, 291 N. Y. 792; see also N. Y. Domestic Relations Law § 70; *Finlay* v. *Finlay*, 240 N. Y. 429, 433.

[4] The New York judgment permits the mother to take the child to Florida during the time she is to have custody, see note 2, but requires her to give a surety bond conditioned upon her surrendering the child to the father at the beginning of the periods prescribed for his having custody.

The mother therefore consistently with the New York decree may lawfully remove the child to Florida. Once he is physically and lawfully present there, it would seem that the courts of that state would be able to acquire jurisdiction over his status and to make further awards concerning it, unless indeed personal service of process upon the father is required for that purpose.

[5] See notes 2, 4. The question would remain whether the Florida courts by making a further decree could relieve the mother of the compulsion of the surety bond.

for such purposes have no proper strict application to these decrees.[6] But, even so, full faith and credit is concerned with finality and only with finality when the question arises in relation to the binding effects of judgments. And the law is clearly settled that while generally the clause requires other states to give judgments as much effect as they have where rendered, it does not require them to give more.[7]

Accordingly, if the state rendering the judgment gives it no final effect to prevent its alteration, I am unable to see how others having jurisdiction of the parties and the subject matter may be required to give it finality in this respect by virtue of the provision for full faith and credit.[8] But this is what we would have to require, in view of the state of Florida law, in order to hold that New York could not make the changes which were incorporated in its judgment.

Whether Florida will be bound to observe those changes, in the event of another application by Mrs. Halvey, is a question upon which however I desire to reserve judgment, along with the other questions reserved in the Court's opinion.

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[6] See the opinion dissenting in part in *Griffin* v. *Griffin*, 327 U. S. 220, at 247; also the concurring opinion in *Barber* v. *Barber*, 323 U. S. 77, at 86.

[7] Rev. Stat. § 905, 28 U. S. C. § 687, and cases cited in *Griffin* v. *Griffin*, 327 U. S. 220, 236, note 1.

[8] Commentators who have suggested that full faith and credit be given to custody decrees have assumed that such awards could be modified only on the basis of new facts occurring subsequent to the original custody decree. See, *e. g.*, Effect of Custody Decree in a State Other Than Where Rendered (1933) 81 U. Pa. L. Rev. 970, 972. As the opinion of the Court points out the power of Florida to modify such a decree is not limited to change of circumstance. See also note 1.